DOCKET

SUPREME COURT
OF THE UNITED STATES

No. 12-123
Title: Marvin D. Horne, et al., Petitioners
v.
Department of Agriculture
Docketed: July 27, 2012
Linked with 11A1125
Lower Ct: United States Court of Appeals for the Ninth Circuit
Case Nos.: (10-15270)
Decision Date: March 12, 2012

Questions Presented

~~Date~~~	~~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~
Feb 4 2012	Administrative record from U.S. Dept. of Justice is electronic.
May 29 2012	Application (11A1125) to extend the time to file a petition for a writ of certiorari from June 10, 2012 to August 9, 2012, submitted to Justice Kennedy.
Jun 1 2012	Application (11A1125) granted by Justice Kennedy extending the time to file until July 25, 2012.
Jul 25 2012	Petition for a writ of certiorari filed. (Response due August 27, 2012)
Aug 21 2012	Order extending time to file response to petition to and including September 26, 2012.
Aug 27 2012	Brief amici curiae of Cato Institute, et al. filed.
Sep 19 2012	Order further extending time to file response to petition to and including October 26, 2012.
Oct 26 2012	Brief of respondent Department of Agriculture in opposition filed.
Nov 5 2012	DISTRIBUTED for Conference of November 20, 2012.
Nov 5 2012	Reply of petitioners Marvin D. Horne, et al. filed. (Distributed)
Nov 20 2012	Petition GRANTED.
Dec 21 2012	The time to file the joint appendix and petitioners' brief on the merits is extended to and including January 9, 2013.
Dec 21 2012	The time to file respondent's brief on the merits is extended to and including February 12, 2013.
Jan 7 2013	SET FOR ARGUMENT ON Wednesday, March 20, 2013
Jan 9 2013	Brief of petitioners Marvin D. Horne, et al. filed.
Jan 9 2013	Joint appendix filed. (Statement of costs received)
Jan 16 2013	Brief amici curiae of Cato Institute, et al. filed.
Jan 16 2013	Brief amicus curiae of Chamber of Commerce of the United States of America filed.

Jan 16 2013	Brief amici curiae of Constitutional Law Scholars filed.
Jan 16 2013	Brief amicus curiae of Texas filed.
Jan 18 2013	Record from U.S.C.A. for 9th Circuit is electronic.
Jan 18 2013	Record from U.S.D.C. for Eastern Districtof California (Fresno) is electronic.
Jan 23 2013	CIRCULATED.
Feb 4 2013	Administrative record from U.S. Dept. of Justice is electronic.
Feb 12 2013	Brief of respondent Department of Agriculture filed. (Distributed)
Feb 19 2013	Brief amicus curiae of International Municipal Lawyers Association filed. (Distributed)
Feb 19 2013	Brief amicus curiae of Sun-Maid Growers of California filed. (Distributed)
Mar 13 2013	Reply of petitioners Marvin D. Horne, et al. filed. (Distributed)
Mar 20 2013	Argued. For petitioners: Michael W. McConnell, Washington, D. C. For respondent: Joseph R. Palmore, Assistant to the Solicitor General, Department of Justice, Washington, D. C.

PETITION FOR WRIT OF CERTIORARI

12 123

FILED
JUL 25 2012
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No.

In the Supreme Court of the United States

MARVIN D. HORNE, ET AL.,

Petitioners,

v.

UNITED STATES DEPARTMENT OF AGRICULTURE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

BRIAN C. LEIGHTON
Attorney at Law
701 Pollasky Avenue
Clovis, CA 93612
(559) 297-6190

MICHAEL W. MCCONNELL*
ADITYA BAMZAI
Kirkland & Ellis LLP
655 Fifteenth Street, N.W.
Washington, DC 20005
(202) 879-5000
michael.mcconnell@kirkland.com
**Counsel of Record*

Counsel for Petitioners

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTIONS PRESENTED

Under federal regulations, a "handler" of raisins must turn over a percentage of his raisin crop to a federal entity in order to sell the remainder on the open market — often in exchange for no payment or payment below the cost of raisin production. For the 2003 and 2004 crop years, the federal government brought an enforcement action against petitioners, seeking to recover the monetary value of raisins they did not turn over to the government. Petitioners raised the Takings Clause as a defense. The Ninth Circuit initially rejected petitioners' takings defense on the merits, but on Petition for Rehearing vacated its prior merits opinion and replaced it with an opinion dismissing the takings defense for lack of jurisdiction. The Questions Presented are:

1. Whether the Ninth Circuit erred in holding, contrary to the decisions of five other Circuit Courts of Appeals, that a party may not raise the Takings Clause as a defense to a "direct transfer of funds mandated by the Government," *Eastern Enterprises v. Apfel*, 524 U.S. 498, 521 (1998) (plurality), but instead must pay the money and then bring a separate, later claim requesting reimbursement of the money under the Tucker Act in the Court of Federal Claims.

2. Whether the Ninth Circuit erred in holding, contrary to a decision of the Federal Circuit, that it lacked jurisdiction over petitioners' takings defense, even though petitioners, as "handlers" of raisins under the Raisin Marketing Order, are statutorily required under 7 U.S.C. § 608c(15) to exhaust all claims and defenses in administrative proceedings before the United States Department of Agriculture, with exclusive jurisdiction for review in federal district court.

RULE 14.1(b) STATEMENT

Petitioners are Marvin D. Horne, Laura R. Horne d.b.a. Raisin Valley Farms, a partnership, and d.b.a Raisin Valley Farms Marketing Association, a.k.a Raisin Valley Marketing, an unincorporated associa tion; the Estate of Don Durbahn* and the Estate o Rena Durbahn, d.b.a. Lassen Vineyards, a partner ship, plaintiffs-appellants below.

Respondent is the United States Department o Agriculture, defendant-appellee below.

---

* Mr. Durbahn, a party to the appeal below, died on July 1l 2012. Petitioners have therefore substituted his Estate as party to this Petition.

RULE 29.6 STATEMENT

Petitioners have no parent corporations and no publicly held corporation owns 10% or more of their stock.

TABLE OF CONTENTS

Page(s)

QUESTIONS PRESENTED i

RULE 14.1(b) STATEMENT ii

RULE 29.6 STATEMENT iii

TABLE OF AUTHORITIES vii

PETITION FOR A WRIT OF CERTIORARI 1

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL & STATUTORY PROVISIONS INVOLVED 1

STATEMENT 2

REASONS FOR GRANTING THE PETITION 13

I. The Ninth Circuit's Holding That A Party May Not Raise A Takings Clause Defense To A Government Order Mandating A "Direct Transfer Of Funds" Conflicts With *Apfel* And The Decisions Of Five Courts Of Appeals. 16

II. The Ninth Circuit's Holding That Petitioners Must Bring Their Takings Clause Defense Under The Tucker Act Conflicts With The Plain Text Of The Statute And A Decision Of The Federal Circuit. 28

CONCLUSION 34

APPENDIX A: Amended Opinion of the United States Court of Appeals for the Ninth Circuit (Mar. 12, 2012) 1a

APPENDIX B: Order of the United States Court of Appeals for the Ninth Circuit (Mar. 12, 2012) 24a

APPENDIX C: Opinion of the United States Court of Appeals for the Ninth Circuit (July 25, 2011) 26a

APPENDIX D: Order of the United States District Court for the Eastern District of California (Dec. 11, 2009) 55a

APPENDIX E: Judgment of the United States District Court for the Eastern District of California (Dec. 11, 2009) 120a

APPENDIX F: Judicial Officer's Order Granting Petition to Reconsider (Sept. 18, 2008) 121a

APPENDIX G: Judicial Officer's Decision and Order (Apr. 11, 2008) 145a

APPENDIX H: Administrative Law Judge's Decision and Order (Dec. 8, 2006) 189a

APPENDIX I: Order of the United States Court of Appeals for the Ninth Circuit (Feb. 29, 2012) 215a

APPENDIX J: Sur-reply to Petition for Panel Rehearing and Rehearing *En Banc* (Feb. 16, 2012) 217a

APPENDIX K: Reply Brief in Support of Petition for Panel Rehearing and Rehearing *En Banc* (Dec. 30, 2011) 230a

APPENDIX L: Opposition to Petition for Panel Rehearing and Rehearing *En Banc* (Nov. 21, 2011) 250a

APPENDIX M: Petition for Panel Rehearing and Rehearing *En Banc* (Sept. 8, 2011) 269a

APPENDIX N: Statutory and Regulatory Provisions Involved 288a

TABLE OF AUTHORITIES

Page(s)

Cases

Arkansas Dairy-Cooperative Association v. USDA,
573 F.3d 815 (D.C. Cir. 2009) 32

Asociación de Subscripcioón Conjunta del Seguro de Responsabilidad Obligatorio v. Flores Galarza,
484 F.3d 1 (1st Cir. 2007) 20

Babbitt v. Youpee,
519 U.S. 234 (1997) 18

Bay View, Inc. v. AHTNA, Inc.,
105 F.3d 1281 (9th Cir. 1997) 14, 22, 23, 24

Block v. Community Nutrition Institute,
467 U.S. 340 (1984) 31

Concrete Pipe & Prods. of Cal., Inc. v. Construction Laborers Pension Trust for Southern Cal.,
508 U.S. 602 (1993) 19

Connolly v. Pension Benefit Guaranty Corp.,
475 U.S. 211 (1996) 19

Eastern Enterprises v. Apfel,
524 U.S. 498 (1998) ..... 11, 13, 14, 18, 19, ... 21, 22, 23, 24, 25, 26, 29

Edaleen Dairy, LLC v. Johanns,
467 F.3d 778 (D.C. Cir. 2006) 32

Evans v. United States,
74 Fed. Cl. 554 (2006) 5

Hodel v. Irving,
481 U.S. 704 (1987) 19

Holliday Amusement Co. of Charleston, Inc. v. South Carolina,
493 F.3d 404 (4th Cir. 2007) 21

In re Chateaugay Corp.,
53 F.3d 478 (2d Cir. 1995) 22, 23, 24

Kaiser Aetna v. United States,
444 U.S. 164 (1979) 26

Lion Raisins, Inc. v. United States,
416 F.3d 1356 (Fed. Cir. 2005) 11, 28, 29, 30, 33

Loretto v. Teleprompter Manhattan CATV Corp.,
458 U.S. 419 (1982) 4, 10

Preseault v. ICC,
494 U.S. 1 (1990) 17

Ruckelshaus v. Monsanto Co.,
467 U.S. 986 (1984) 17, 20

Student Loan Marketing Association v. Riley,
104 F.3d 397 (D.C. Cir. 1997) 21, 22, 24

Suitum v. Tahoe Reg'l Planning Agency,
520 U.S. 725 (1997) 18

United Dairymen of Arizona v. Veneman,
279 F.3d 1160 (9th Cir. 2002) 15

United States v. Ruzicka,
329 U.S. 287 (1946) 14, 29

Washington Legal Foundation v. Texas Equal Access to Justice Foundation,
270 F.3d 180 (5th Cir. 2001), *vacated on other grounds sub nom. Phillips v. Washington Legal Foundation*, 538 U.S. 942 (2003) 19

Washlefske v. Winston,
234 F.3d 179 (4th Cir. 2000) 20

Williamson County Reg'l Planning Comm'n v. Hamilton Bank,
473 U.S. 172 (1985) 16, 17, 20, 25

Constitutional Provisions

U.S. Const. amend. V 1, 16

Statutes and Regulations

7 U.S.C. § 601 2
7 U.S.C. § 608c(5) 31
7 U.S.C. § 608c(13) 15
7 U.S.C. § 608c(14) 7, 9
7 U.S.C. § 608c(15) 7, 9, 30, 31
28 U.S.C. § 1254(1) 1
28 U.S.C. § 1491(a)(1) 2, 17
7 C.F.R. § 900.51(i) 7, 31
7 C.F.R. Part 989 ..... 2, 6
7 C.F.R. § 989.11 5
7 C.F.R. § 989.15 5
7 C.F.R. § 989.21 6
7 C.F.R. § 989.54 ..... 5, 9
7 C.F.R. § 989.55 5
7 C.F.R. § 989.65 ..... 5, 6
7 C.F.R. § 989.66 ..... 5, 6, 8
7 C.F.R. § 989.67 6
7 C.F.R. § 989.80 9
7 C.F.R. § 989.166 ..... 6, 8

Other Authorities

Raisin Administrative Committee, *Marketing Policy and Industry Statistics, 2010* 6

Wright, Charles Alan *et al.*, *Federal Practice & Procedure* (3d ed. 2010) 30

PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully submit this petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the court of appeals has been designated for publication and is reported at 673 F.3d 1071. Pet. App. 1a. An earlier opinion of the court of appeals was designated for publication, but was undesignated upon the issuance of the court of appeals' second opinion. *Id.* at 26a. The opinion of the district court is unpublished, and electronically reported at 2009 WL 4895362. Pet. App. 55a.

JURISDICTION

The court of appeals rendered its original decision in this case on July 25, 2011. The court of appeals then denied petitioners' petition for panel rehearing and rehearing *en banc* and issued a substantially revised opinion on March 12, 2012. On June 1, 2012, Justice Kennedy extended the time for filing a petition for certiorari to and including July 25, 2012. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL & STATUTORY PROVISIONS INVOLVED

The Fifth Amendment of the United States Constitution provides, in relevant part:

> [N]or shall private property be taken for public use, without just compensation.

U.S. Const. amend. V.

The relevant provisions of the Tucker Act, 28

U.S.C. § 1491(a)(1); the Agricultural Marketing Agreement Act of 1937 ("AMAA"), 7 U.S.C. § 601 *et seq.*; and the *Marketing Order Regulating the Handling of Raisins Produced from Grapes Grown in California*, 7 C.F.R. Part 989 ("Raisin Marketing Order" or "the Order") are set forth in the appendix to this petition.

STATEMENT

Under the Depression-era Agricultural Marketing Agreement Act of 1937, and accompanying regulations, the United States Department of Agriculture ("USDA") requires "handlers" of raisins to set aside a specified portion of their yearly raisin crop — known as "reserve-tonnage" raisins — "for the account" of a committee established by the Department. The committee, known as the Raisin Administrative Committee ("RAC"), then (1) disposes of the reserve-tonnage raisins as it sees fit — often to be used in federal school lunch and other nutritional programs — and (2) pays such compensation for the raisins as it sees fit. In the two years relevant to this case (2002-2003 and 2003-2004), handlers were required to set aside 47 percent and 30 percent of the crop, respectively, as reserve-tonnage raisins. For the 2003-2004 year, the RAC determined that compensation for reserve-tonnage raisins should be set at precisely zero dollars — *i.e.*, petitioners received no compensation for the USDA's appropriation of almost one-third of their crop. For the 2002-2003 year, the RAC set a compensation price that was well below the cost of producing raisins.

The result of these regulations is that the federal government — without providing the just compensation required by the Fifth Amendment — extracts

title to a hefty portion of a farmer's annual raisin crop as a condition for giving the farmer permission to sell the remainder of his crop on the market.

In 2004, the USDA initiated an enforcement action against petitioners for failing to set aside the reserve-tonnage raisins during the 2002-2003 and 2003-2004 years. In administrative proceedings, the USDA sought, and ultimately recovered, the dollar equivalent of the raisins that petitioners were supposed to have given, but did not give, to the government. As required by statute, petitioners raised all defenses — including their Takings Clause defense — before the agency. After losing before the agency, petitioners sought judicial review of the order in the United States District Court for the Eastern District of California, as required by the exclusive jurisdiction provision set forth in the AMAA. Among other things, petitioners argued that imposition of the fine would amount to a taking without just compensation under the Fifth Amendment to the U.S. Constitution. The District Court granted summary judgment for the government, and petitioners appealed.

A panel of the Ninth Circuit initially affirmed the judgment of the District Court on the merits. The panel reasoned that the regulatory scheme's requirement that petitioners forfeit a substantial portion of their raisin crop to the government was not a taking for which just compensation is due because the regulation "applies to [petitioners] only insofar as they voluntarily choose to send their raisins into the stream of interstate commerce." Pet. App. 43a.

After petitioners filed a rehearing petition pointing out that the panel opinion was inconsistent with *Loretto v. Teleprompter Manhattan CATV Corp.*, 458

U.S. 419, 439 n.17 (1982), the panel abruptly changed course and held — without ordering full briefing on the issue or oral argument — that the court lacked jurisdiction over the takings issue. The panel reasoned that petitioners' takings defense was premature and must be brought as a freestanding claim for compensation in a subsequent Tucker Act action in the Court of Federal Claims. At the same time, the panel resolved petitioners' statutory and Eighth Amendment arguments. The panel held it lacked jurisdiction even though (1) petitioners raised the Takings Clause not in an affirmative lawsuit seeking compensation from the federal government, but as a defense to a government-initiated action seeking a payment of money from *them*, and (2) petitioners, as "handlers," were statutorily required to exhaust their takings defense before the agency, and to seek judicial review of the agency's disposition of that claim in federal district court.

Under the panel's reasoning, a raisin handler with both Takings Clause and other defenses to agency action must bifurcate his defenses and undertake two separate trips through the courts. First, he must bring all other claims and defenses in federal district court under the AMAA. Then, if he is unsuccessful, he must pay any fine assessed and bring a separate Tucker Act lawsuit in the Court of Federal Claims to challenge the fine as a taking without just compensation. Nothing in the text of the AMAA or principles of takings law requires such a cumbersome and counterintuitive procedural framework.

1. Under the AMAA, the USDA heavily regulates segments of California's agricultural economy. Pursuant to the Act, the USDA has promulgated "marketing orders" for raisins, as well as several other

agricultural products, such as walnuts, almonds, prunes, tart cherries, and spearmint oil. *See Evans v. United States*, 74 Fed. Cl. 554, 558 (2006). In general, these orders establish food product reserve programs under which farmers must set aside a specified portion of their agricultural crop for the federal government.

The order regulating raisins was promulgated in 1949. While similar in some respects to orders regulating other agricultural segments, the Raisin Marketing Order is different in two crucial ways: "it effects a direct transfer of title of a producer's 'reserve tonnage' raisins to the government, and it requires physical segregation of the reserve-tonnage raisins held for the government's account." *Evans*, 74 Fed. Cl. at 558; *see also* 7 C.F.R. §§ 989.54, 989.55, 989.65, 989.66.

The Order separately defines "handlers" and "producers" of raisins. A "handler" is:

> (a) [a]ny processor or packer; (b) any person who places, ships, or continues natural condition raisins in the current of commerce from within [California] to any point outside thereof; (c) any person who delivers off-grade raisins, other failing raisins or raisin residual material to other than a packer or other than into any eligible non-normal outlet; or (d) any person who blends raisins [subject to certain exceptions].

7 C.F.R. § 989.15. A "producer" is "any person engaged in a proprietary capacity in the production of grapes which are sun-dried or dehydrated by artificial means until they become raisins." § 989.11.

Under the Order, the RAC and USDA must e
lish certain raisin tonnage requirements, know
"reserve tonnage" and "free tonnage" percent
which vary from year to year. 7 C.F.R. §§ 9
989.166. The percentages are established by
unknown until) February 15 of each crop year,
after farmers have expended substantial reso
for the cultivation and harvest of their crop fo
year. §§ 989.21, 989.54(d). Once the percentage
fixed, "handlers" of raisins must set aside the
serve tonnage" requirement "for the account" o
RAC. §§ 989.65, 989.66(a), (b)(1). The RAC ma
quire the delivery of the reserve-tonnage raisi
anyone chosen by the RAC to receive
§ 989.66(b)(4). Or the RAC may sell reserve-ton
raisins to handlers for resale in export mar
§§ 989.67(c)-(e), or it may simply direct that th
sold or disposed of by direct sale or gift to U
States agencies, foreign governments, or char
organizations, §§ 989.67(b)(2)-(4).

Pursuant to these regulations, in the two yea
levant to this case, 2002-2003 and 2003-2004
USDA required farmers to turn over 47 percen
33 percent of their raisin crop. *See* Raisin Adm
trative Committee, *Marketing Policy and Inc*
Statistics, 2010, at 27, *available*
http://www.raisins.org/files/Marketing%20Policy
010.pdf (last visited July 25, 2012). Through th
serve-tonnage set-aside, the government obta
respectively, 22.1 million and 38.5 million pour
raisins in those two years. *See id.* at 20. In
2003, the farmers who produced those raisins
paid well below the cost of production (and consi
bly less than their fair market value). In 2003-
the government paid nothing at all for the 38.

lion pounds of raisins that it took and used. Pet. App. 9a.

The AMAA creates administrative and judicial review procedures that "handlers" of raisins must follow to appeal a USDA order. Any "handler" who violates a marketing order is subject to fines and penalties in a final USDA order, which is "reviewable in the district courts of the United States in any district in which the handler subject to the order is an inhabitant." 7 U.S.C. §§ 608c(14)(A)-(B). A "handler" may also bring a pre-enforcement petition with the Secretary of Agriculture arguing that a marketing order "is not in accordance with law." § 608c(15)(A). The "District Courts of the United States in any district in which such handler is an inhabitant, or has his principal place of business, are [ ] vested with jurisdiction in equity to review such ruling." § 608c(15)(B). The USDA has also promulgated "Rules of Practice Governing Proceedings on Petitions to Modify or to Be Exempted from Marketing Orders," under which "[t]he term handler means any person who, by the terms of a marketing order, is subject thereto, or to whom a marketing order is sought to be made applicable." 7 C.F.R. § 900.51(i). As a result, all persons subject to marketing orders must bring any defenses they may have to USDA orders in District Court.

2. Petitioners are independent farmers, a very small part of the large raisin industry in California, which produces approximately 99.4 percent of the United States' and 40 percent of the world's raisin crop. Since 1969, they have produced raisins in Fresno and Madera Counties.

Because they marketed only their own raisins and did not otherwise participate in the distribution end

of the raisin business, petitioners regarded themselves as "producers" and not "handlers" under the Raisin Marketing Order and the AMAA. They therefore did not set aside the reserve-tonnage requirement for 2002-2003 and 2003-2004, the two years relevant to this case. Pet. App. 10a.

3. On April 1, 2004, the Administrator of the Agricultural Marketing Service initiated an enforcement action against petitioners within the USDA, claiming that they had violated the AMAA by failing to comply with the Raisin Marketing Order. Pet. App. 11a. According to the Administrator, petitioners became "handlers" subject to the Order upon their marketing of their own raisins. Under this argument, all producers who sell any portion of their crop are effectively handlers subject to the Order.

An Administrative Law Judge in the USDA agreed. Pet. App. 189a. On appeal from that decision, a USDA Judicial Officer ("JO") found petitioners liable for various regulatory violations. Petitioners unsuccessfully raised their Takings Clause defense in these proceedings. *Id.* at 136a, 168a.

Of relevance here, the JO determined that, as "handlers," petitioners violated 7 C.F.R. § 989.66 and § 989.166 by failing to hold reserve raisins for the 2002-2003 and 2003-2004 crop years. Pet. App. 121a, 145a. The JO ordered forfeitures and penalties for petitioners' failure to acquiesce in the USDA's taking of their property. Specifically, the JO ordered petitioners to pay $438,843.53, the alleged dollar equivalent of the withheld raisin reserve contributions for the 2002-2003 (632,427 pounds) and 2003-2004 (611,159 pounds) crop years, as determined by the "field price" typically paid to producers for free-

tonnage raisins in those years. 7 C.F.R. § 989.54(b). The JO also ordered petitioners to pay $202,600 in civil penalties pursuant to 7 U.S.C. § 608c(14)(B), and an additional $8,783.39 in unpaid assessments pursuant to 7 C.F.R. § 989.80(a). It was only in their capacity as "handlers" that petitioners were subject to the Order (and hence these fines and penalties).

4. Petitioners filed this action in District Court seeking review of the agency decision pursuant to section 608c(15)(B). Petitioners contended that the requirement that they contribute a specified percentage of their raisin crop to the government is a taking in violation of the Fifth Amendment. Petitioners also argued that (1) they are producers, not handlers, and thus are not subject to the Raisin Marketing Order; and (2) the penalties imposed upon them violate the Eighth Amendment Excessive Fines Clause. The district court granted summary judgment for the USDA. Pet. App. 55a.

Petitioners appealed. On July 25, 2011, a panel of the Ninth Circuit affirmed the judgment in its entirety. The panel held that petitioners are "'handlers' subject to the Raisin Marketing Order's provisions." Pet. App. 38a. With respect to petitioners' takings defense, the panel observed that the argument that a farmer must receive just compensation for a government appropriation of raisins "has some understandable appeal." *Id.* at 42a. The panel recognized that the "raisins are personal property, personal property is protected by the Fifth Amendment, and each year the RAC 'takes' some of their raisins, at least in the colloquial sense." *Id.* And the panel acknowledged that "the government could [not] come onto the Hornes' farm uninvited and walk off with forty-seven percent of their crops without offering just compensa-

tion." *Id.* Yet the panel held that no taking o under the regulatory scheme — and no compen is required — when "the Raisin Marketing Ord plies to the Hornes only insofar as they volun choose to send their raisins into the stream of state commerce." *Id.* at 43a.

5. In a Petition for Panel Rehearing or Reh *En Banc*, petitioners pointed out that this Co *Loretto* had rejected the panel's reasoning in sage that the panel failed to address. Pet. App. There, Justice Marshall, writing for the Court that:

> It is true that the landlord could avoid the requirements of § 828 by ceasing to rent the building to tenants. But a landlord's ability to rent his property may not be conditioned on his forfeiting the right to compensation for a physical occupation. [Defendant's] broad "use-dependency" argument proves too much. For example, it would allow the government to require a landlord to devote a substantial portion of his building to vending and washing machines, with all profits to be retained by the owners of these services and with no compensation for the deprivation of space. It would even allow the government to requisition a certain number of apartments as permanent government offices. The right of a property owner to exclude a stranger's physical occupation of his land cannot be so easily manipulated.

458 U.S. at 439 n.17.

The government filed an opposition to petitioners' rehearing request. In its opposition, the government argued — for the first time in the litigation — that the panel lacked subject matter jurisdiction over the takings defense, because that issue must be brought in the Court of Federal Claims under the Tucker Act. The government claimed that "[n]othing in the AMAA precludes a Tucker Act claim for an alleged taking under a marketing order." Pet. App. 257a. It drew no jurisdictional distinction between claims brought by handlers and claims brought by producers.

In reply, petitioners explained that under *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998) (plurality), a takings defense to a direct transfer of funds mandated by the government was immediately ripe. Petitioners also observed that the AMAA provided exclusive administrative and judicial review provision for "handlers" of raisins; that, according to the government and the panel, petitioners were "handlers"; and that the government's position was inconsistent with the Federal Circuit's holding that raisin "handlers" could not bring a takings claim in the Court of Federal Claims. *See Lion Raisins, Inc. v. United States*, 416 F.3d 1356, 1372 (Fed. Cir. 2005). Pet. App. 230a.

The panel then invited the government to file a sur-reply. In that filing, the government acknowledged that the AMAA established excusive administrative and judicial review provisions for raisin "handlers." But it claimed for the first time that petitioners were "producer-handlers" of raisins; that producer-handlers are required to follow the AMAA's administrative provisions only when they bring claims in their capacity as handlers; and that petitioners had brought their takings claim in their capacity as producers. Pet. App. 217a.

Because this novel jurisdictional theory appeared to contradict the USDA's position that petitioners were liable under the Order in their capacity as handlers, petitioners requested leave to file a supplemental brief. This motion was denied. Pet. App. 215a.

On March 12, 2012, the panel issued a substantially revised opinion. The panel's new opinion retained its initial holdings that petitioners satisfied the definition of "handlers" under the Raisin Marketing Order and that petitioners did not have a valid defense under the Excessive Fines Clause. But the panel replaced the entirety of its disposition of petitioners' takings defense on the merits with a disposition on jurisdictional grounds. Pet. App. 14a-18a.

The panel's jurisdictional analysis took two steps. First, the panel concluded that "the just-compensation requirement does not force the government to provide immediate compensation at the time of a taking; it must simply provide an adequate process for obtaining compensation." Pet. App. 15a (quotation marks and citations omitted). In this regard, the panel concluded that equitable takings challenges — including equitable takings challenges to transfers of money damages to the federal government — must be brought in the Court of Federal Claims under the Tucker Act. Second, the panel concluded that, although the AMAA establishes an exclusive judicial review provision for "handlers" of raisins (which petitioners have followed), and although petitioners are "handlers" of raisins, they are "producer-handlers" who must bring their takings claim "in their capacity as producers." *Id.* at 17a.

Notwithstanding the new disposition of petitioners' takings defense, the panel still provided that

"[t]he summary judgment of the district court is AFFIRMED," Pet. App. 23a — rather than vacated and remanded with instructions to dismiss petitioners' takings defense for lack of jurisdiction. On the same day as the revised opinion, the panel released an order providing that it would not entertain any additional petitions for rehearing in the appeal. *Id.* at 24a.

REASONS FOR GRANTING THE PETITION

The panel's jurisdictional holding rests on two fundamental and independent errors, either one of which would require reversal of the judgment below.

First, contrary to the reasoning of a plurality of this Court and the holdings of five courts of appeals, the panel failed to recognize that a private party may bring an equitable Takings Clause defense to the imposition of a money-damages fine. Such a defense is ripe the moment it is initiated because, in requiring the payment of money, the government has already determined that no "just compensation" will be forthcoming in any subsequent proceedings. Accordingly, the ripeness requirement for equitable claims to enjoin a "direct transfer of funds mandated by the Government" is altogether different from the rules governing requests for money damages from the federal Government or injunctions to block the Government's taking of tangible property. *Apfel*, 524 U.S. at 521 (plurality). Under such circumstances, "the presumption of Tucker Act availability must be reversed" because a separate and subsequent "claim for compensation would entail an utterly pointless set of activities." *Id.* (quotation marks and citations omitted). Both before and after *Apfel*, courts of appeals have applied this rule of constitutional ripeness for "direct

transfers of funds."

Petitioners brought this aspect of *Apfel* to the Ninth Circuit's attention, but the panel ignored it. Instead, the panel relied on *Bay View, Inc. v. AHT-NA, Inc.*, 105 F.3d 1281 (9th Cir. 1997), a pre-*Apfel* case on the wrong side of the circuit split addressed in *Apfel*. The panel's decision thus conflicts with the law of this Court and creates a sharp circuit split with the decisions of other federal courts of appeals.

Second, the panel correctly recognized that "handlers" of raisins under the AMAA must raise their challenges in administrative proceedings, and then use the AMAA's exclusive judicial review procedures to appeal those challenges. Pet. App. 16a. And the panel correctly noted that petitioners — whom the USDA and the panel determined to be "handlers" under the AMAA and Raisin Marketing Order — have followed those exclusive review provisions in this case. Yet the panel nevertheless held that petitioners brought their takings defense "not in their capacity as handlers but in their capacity as producers," *id.* at 17a, and accordingly could not take advantage of the exclusive judicial review procedures for handlers of raisins to challenge a fine that was imposed on them solely in their capacity as handlers of raisins.

Nothing in law or logic supports this Kafkaesque result. The panel's holding is flatly contrary to the statutory text of the AMAA's exclusive review provisions. Under the AMAA, "[a]ny handler" — not just some handlers — seeking to challenge an order, including on constitutional grounds, must exhaust administrative remedies before the Secretary of Agriculture. 7 U.S.C. § 608c(15)(A); *see United States v. Ruzicka*, 329 U.S. 287, 294 (1946); *United Dairymen*

of Arizona v. Veneman, 279 F.3d 1160, 1165-166 (9th Cir. 2002). The statute makes no provision for separate treatment of "handlers" who are also deemed "producers," such that a "handler" challenging a reserve program in its "capacity as [a] producer[]" may somehow avoid the judicial review provisions. To the contrary, it provides that a marketing order shall not "be applicable to any producer in his capacity as a producer." 7 U.S.C. § 608c(13)(B). The panel deprives "handler-producers" of their statutory right to obtain judicial review of agency orders before the District Court.

The panel's holding that petitioners bring their takings challenge "in their capacity as producers" contradicts the procedural history of this case. It was the agency that insisted that petitioners are "handlers," and the panel held they were "handlers" at the USDA's urging. Indeed, it was only in their capacity as "handlers" that the reserve requirements applied to petitioners or that they were fined for noncompliance. If an order is imposed on a party as a "handler," it defies logic to say his attempt to obtain judicial review of that order is undertaken in some other capacity.

These legal errors, by themselves, would warrant this Court's review. The curious procedural twists that this appeal has taken before the Ninth Circuit, however, bolster the need for this Court's intervention. After the government raised its jurisdictional argument for the first time in its opposition brief to petitioners' rehearing petition, the panel did not request full briefing or oral argument on the jurisdictional issues — as petitioners suggested it should. Instead, the panel allowed the government to raise new jurisdictional arguments in its sur-reply brief,

and then did not permit petitioners to file a sup mental brief addressing those new arguments. . then, after holding that courts other than the C of Federal Claims lack subject-matter jurisdic over petitioners' Takings Clause defense, the p concluded its revised opinion with the words: "[summary judgment of the district court is FIRMED," instead of vacating the district court's rits disposition of that issue for want of jurisdict After all that, the panel specifically disallowed tioners to file a new rehearing petition from the jurisdictional holding.

With all respect, it is intolerable for a panel United States Court of Appeals to treat a part this fashion. For these reasons, and those expla in further detail below, this Court should grant petition for certiorari.

I. The Ninth Circuit's Holding That A P May Not Raise A Takings Clause Defens A Government Order Mandating A "Di Transfer Of Funds" Conflicts With *Apfel* The Decisions Of Five Courts Of Appeals.

1. The Takings Clause of the Fifth Amendme the United States Constitution provides that pri property shall not "be taken for public use, wit just compensation." U.S. Const. amend. V. Court has interpreted the Clause as incorporati "ripeness" requirement that, ordinarily, requir plaintiff seeking money damages to pursue ave for compensation before bringing a takings claim. the Court explained in *Williamson County Regi Planning Commission v. Hamilton Bank*, 473 172 (1985), the Fifth Amendment proscribes not taking of property, but takings without just com

sation. As a result, "[i]f the government has provided an adequate process for obtaining compensation, and if resort to that process 'yield[s] just compensation,' then the property owner 'has no claim against the Government' for a taking." *Id.* at 194-95 (citation omitted). According to *Williamson County*, the Fifth Amendment does not "require that just compensation be paid in advance of, or contemporaneously with, the taking; all that is required is that a reasonable, certain and adequate provision for obtaining compensation exist at the time of the taking." *Id.* at 194 (quotation marks and citation omitted).

In the federal context, the Tucker Act gives the Court of Federal Claims exclusive jurisdiction over "any claim against the United States founded . . . upon the Constitution" (including just compensation claims) in excess of $10,000. 28 U.S.C. § 1491(a)(1). As a result, in general, "taking claims against the Federal Government are premature until the property owner has availed itself of the process provided by the Tucker Act." *Williamson*, 473 U.S. at 195 (citation omitted); *see also Preseault v. ICC*, 494 U.S. 1, 11 (1990). Correspondingly, in general, "[e]quitable relief is not available to enjoin an alleged taking of private property for a public use, duly authorized by law, when a suit for compensation can be brought against the sovereign subsequent to the taking." *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1016 (1984).

2. This Court has, however, recognized important exceptions to the general rule and thereby recognized circumstances in which a party may enjoin a taking.

Specifically, a requirement that a private party make a cash payment to the government implies that

no Takings Clause remedy will later be available under the Tucker Act to recover those funds. Accordingly, a plurality of this Court has explained that a party may bring an equitable takings defense, prior to the initiation of a Tucker Act lawsuit, to a "direct transfer of funds mandated by the Government." *Apfel*, 524 U.S. at 521 (quotation marks and citation omitted). Ripeness is a limitation on the party invoking federal judicial authority. As the *Apfel* plurality recognized, it does not logically foreclose a takings defense to a remedy sought by the government that, if granted, would violate the Constitution.

The facts of *Apfel* are illustrative. In *Apfel*, the Court considered a takings claim by a company no longer involved in the coal industry that challenged the constitutionality of an act establishing a mechanism for funding health care benefits for coal industry retirees. Justice O'Connor, writing for a plurality of the Court, concluded that the act violated the Takings Clause and the challenged provisions should be enjoined as applied to Eastern. As a preliminary matter, however, the opinion was forced to address the Court's jurisdiction, because Eastern raised the Takings Clause in "a declaratory judgment that the [act] violates the Constitution and a corresponding injunction against the . . . enforcement of the Act as to Eastern." *Id.* at 520.

The plurality determined that the takings issue was ripe. It noted that this Court had many times addressed takings claims on the merits in comparable postures. *See Babbitt v. Youpee*, 519 U.S. 234 (1997); *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725 (1997); *Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211 (1996); *Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Trust for S. Cal.*, 508 U.S.

602 (1993); *Hodel v. Irving*, 481 U.S. 704 (1987). The plurality reasoned that "Congress could not have contemplated that the Treasury would compensate coal operators for their liability under the Act for '[e]very dollar paid pursuant to a statute would be presumed to generate a dollar of Tucker Act compensation.'" 524 U.S. at 521 (citation omitted). "Accordingly, the presumption of Tucker Act availability must be reversed where the challenged statute, rather than burdening real or physical property, requires a direct transfer of funds mandated by the Government." *Id.* (quotation marks and citation omitted). "In that situation, a claim for compensation would entail an utterly pointless set of activities." *Id.* (quotation marks and citation omitted). "[T]he declaratory judgment and injunction sought by [Eastern] constitute an appropriate remedy under the circumstances, and . . . it is within the district courts' power to award such equitable relief." *Id.* at 522.

3. After *Apfel*, three courts of appeals held that a Takings Clause challenge to a "direct transfer of funds" is ripe at the point at which the transfer is required, joining two other circuits that had reached the same conclusion prior to *Apfel*.

In *Washington Legal Foundation v. Texas Equal Access to Justice Foundation*, 270 F.3d 180 (5th Cir. 2001), *vacated on other grounds sub nom. Phillips v. Washington Legal Foundation*, 538 U.S. 942 (2003), the Fifth Circuit addressed whether equitable relief was available to enjoin the alleged taking of interest in IOLTA accounts. The court observed that "the challenged governmental action in the case at hand does not merely burden real or personal property; instead, it involves [the State's] taking all of the interest earned on client-funds in IOLTA accounts." *Id.* at

193. The court thus held that "it is more analogous to the challenged governmental actions in [*Apfel*], which involved payment of money to, or to support, a government program, than to the challenged governmental actions in *Monsanto* and *Williamson County*, which burdened real or personal property, and in which a procedure for seeking just compensation was available." *Id.* at 193-94. The Fifth Circuit explained that, "because the purpose of IOLTA is to take the interest generated from client-funds and use it to fund legal services for the indigent, it is obvious that the program makes no provision for payment of just compensation. If the interest earned on client-funds were available as just compensation for the clients, the very purpose of the program would be thwarted; therefore, it would defy logic, to say the least, to presume the availability of a just compensation remedy." *Id.* at 194.

Similarly, in *Asociación de Subscripción Conjunta del Seguro de Responsabilidad Obligatorio v. Flores Galarza*, 484 F.3d 1 (1st Cir. 2007), the First Circuit held that this "line of cases suggests the inapplicability of the *Williamson County* prerequisites to a taking that involves the direct appropriation of funds." *Id.* at 19.

Likewise, in *Washlefske v. Winston*, 234 F.3d 179 (4th Cir. 2000), the Fourth Circuit held that ripeness under the Takings Clause "is not applicable where the challenged statute, rather than burdening real or physical property, requires a direct transfer of funds to the government." *Id.* at 183 (quotation marks and citation omitted). The court thus addressed on the merits a Takings Clause challenge to a prisoner's allegation that he was deprived of private property without just compensation when the State of Virginia

expended the interest on his prison accounts for the general benefit of inmates under the State's care. *See id.* at 181-82; *see also Holliday Amusement Co. of Charleston, Inc. v. South Carolina*, 493 F.3d 404, 407 (4th Cir. 2007) (recognizing in *dicta* that "a challenge to a statute requiring direct transfer of funds to the government" is immediately ripe under the Takings Clause).

In addition, prior to *Apfel*, two courts of appeals had already held that a Takings Clause challenge to a "direct transfer of funds" is ripe at the point at which the transfer is required. Both cases were cited with approval in *Apfel*.

In *Student Loan Marketing Association v. Riley*, 104 F.3d 397 (D.C. Cir. 1997), Sallie Mae requested a declaratory judgment that a fee imposed by Congress was an unconstitutional taking in violation of the Fifth Amendment. The D.C. Circuit held that "in cases involving straightforward mandates of cash payment to the government, courts may reasonably infer either that Tucker Act jurisdiction has been withdrawn or at least that any continued availability does not wipe out equitable jurisdiction." *Id.* at 402. Although "[n]ormally a taking claim against the federal government must be brought as a suit for money damages . . . under the Tucker Act" and "the plaintiff is barred from suing for equitable relief in district court, or is required to seek a Tucker Act remedy first, before suing for equitable relief," *id.* at 401 (citations omitted), the rule is altered when it comes to such mandates of cash payment. In the case of "direct transfers of money to the government . . . , use of the Tucker Act remedy would entail an utterly pointless set of activities, as every dollar paid pursuant to a statute would be presumed to generate a dollar of

Tucker Act compensation." *Id.* at 401 (quotation marks, citations, and alterations omitted).

Similarly, the Second Circuit held that "where the challenged statute requires a person or entity to pay money to the government, it must be presumed that [the government] had no intention of providing compensation for the deprivation." *In re Chateaugay Corp.*, 53 F.3d 478, 493 (2d Cir. 1995). The plurality favorably cited *Chateaugay* and *Riley* in *Apfel*. 524 U.S. at 521.

4. The panel opinion conflicts with the plurality opinion in *Apfel* and the decisions of these five courts of appeals.

Petitioners do not seek monetary damages from the federal government, nor do they seek to enjoin the government's appropriation of tangible property. Instead, petitioners bring an equitable challenge to a USDA order that requires them to transfer funds to a government entity. They seek, in effect, a judicial order that they need not pay a fine and accompanying penalties because it would violate the Takings Clause. Under *Apfel*, and in any of the five circuits discussed immediately above, such an equitable challenge would be immediately ripe without the need to bring an "utterly pointless" second set of proceedings in the Court of Federal Claims.

The panel's contrary determination relied on the Ninth Circuit's own precedent in *Bay View*, to hold that "the just-compensation requirement does not force the government to provide immediate compensation at the time of a taking; 'it must simply "provide an adequate process for obtaining compensation."'" Pet. App. 15a (quoting 105 F.3d at 1285). The panel stressed *Bay View*'s centrality to its jurisdic-

tional disposition: "*Bay View* makes clear that we lack jurisdiction to address the merits of [petitioners'] takings claim where Congress has provided a means for compensation." Pet. App. 18a.

The problem is that *Bay View* was repudiated by the plurality in *Apfel*. In *Bay View* — which was decided a year before *Apfel* — the Ninth Circuit criticized this Court as "partly to blame for [the] confusion" surrounding the justiciability of equitable takings claims because "it has sometimes reached the merits of takings claims against the United States and at other times refused." 105 F.3d at 1285. *Bay View* described as "totally wrong" and "[a]dding to the confusion" the holdings of the "many courts [that] have viewed the Tucker Act as a jurisdictional hurdle against the payment of damages but not as an impediment to equitable relief." *Id.* at 1286. One of the courts listed as having conducted a "totally wrong" analysis was the Second Circuit in *Chateaugay*, which the plurality favorably cited in *Apfel*. 524 U.S. at 521.

In *Apfel*, the plurality resolved that conflict against *Bay View* and in favor of the decisions criticized in *Bay View*. Specifically, the plurality contrasted the holdings of certain courts of appeals, which "have accepted the view that the Tucker Act does not apply to suits seeking only equitable relief," with *Bay View*, which "concluded that a claim for equitable relief under the Takings Clause is hypothetical, and therefore not within the district courts' jurisdiction, until compensation has been sought and refused in the Court of Federal Claims." *Id.* at 520-521 (citing, *inter alia*, *Bay View*, 105 F.3d at 1286). The plurality went on to reject the categorical rule in *Bay View*, explaining that "in a case such as this one,

it cannot be said that monetary relief against Government is an available remedy," and that "presumption of Tucker Act availability must be versed where the challenged statute, rather t burdening real or physical property, requires a di transfer of funds mandated by the Government." U.S. at 521 (citing *Chateaugay*, 53 F.4d at 493, *Riley*, 104 F.3d at 401) (quotation marks omitted).

In short, *Apfel* recognized the split between *View* and other courts of appeals and repudiated Ninth Circuit's reasoning in *Bay View*. For the c of appeals to resuscitate *Bay View*, even after t precedent was repudiated by a plurality of this Co demands immediate review and correction.

5. The panel's error presents a significant and curring question of wide federal importance.

First, this case raises fundamental questions garding the nature of the right to just compensa and the applicability of *Williamson County*'s ripe doctrine when private property owners seek to *de* against government actions to extract money or o property. The panel's decision erases important l tations on that doctrine, widening the scope of Takings Clause's "ripeness" requirement far bey its constitutional boundaries.

This Court has established a *general* principl subject to important limitations — that a tak claim cannot be *initiated* by a property owner to join a governmental taking. That general princ rests on a gloss of the Takings Clause's text: Bec the Clause permits takings (requiring only that t be compensated with "just compensation") and cause the Clause does not "require that just com sation be paid in advance of, or contemporaneo

with, the taking," a party claiming a taking must ordinarily exhaust state (or Tucker Act) avenues of relief where the "government has provided an adequate process for obtaining compensation." *Williamson County*, 473 U.S. at 194-95. *Apfel*, however, recognizes that this general principle is inapplicable and not an appropriate gloss on the text of the Fifth Amendment where the *State* initiates proceedings to extract money or other property from the private citizen. In that case, the property owner's takings defense is made ripe by the government's action. By failing to recognize this limitation on *Williamson County*, the opinion below has converted the general principle against equitable takings claims into a categorical doctrine unmoored from constitutional text and principle.

Second, that doctrinal error has important practical consequences for Takings Clause challenges to fines, penalties, and other direct transfers of money. In determining that an equitable Takings Clause challenge to a direct transfer of funds was immediately ripe, the *Apfel* plurality recognized that requiring a second Tucker Act proceeding with a separate "claim for compensation would entail an utterly pointless set of activities." 524 U.S. at 521 (quotation marks and citation omitted). In this case (and others like it), the panel's holding requires precisely such a second and subsequent Tucker Act proceeding in the Court of Federal Claims. Rather than litigating all of one's federal statutory and constitutional claims in a single piece of litigation, as Congress provided, the panel opinion requires a party to exhaust first his statutory and administrative challenges in federal court, then pay the fine before bringing another, separate action in the Court of Federal Claims to recover the exact

same amount of money as the fine.

Such duplication of judicial proceedings is "utt pointless." It is an inefficient use of court resour It is unduly burdensome for small private prop owners such as petitioners, who can ill afford a si proceeding against the government, let alone And it would allow the government to wield the s of imposed bankruptcy upon private property own who would be unable to challenge transfers of mc as takings until they have been paid.

That is all the more true where, as here, the ernment, not a private party, has initiated the ceedings to seek money damages. The *governn* brought administrative proceedings against *petit ers*, not the other way around. And while petitio then sought review of the agency's order (using AMAA's exclusive judicial review provision), the el's reasoning indicates that petitioners could have raised a Tucker Act defense even if the gov ment had initiated the proceeding in court ra than before the agency. It is one thing to tell a vate party it must refrain from initiating litiga until it is ripe, and that the case must be filed particular court. It is quite another to tell a pri party against whom the government initiates ceedings that its *defense* is not ripe until the ca over, and that the court in which the governn brought its claim is unable to hear that defense. *Kaiser Aetna v. United States*, 444 U.S. 164 (1 (addressing takings claim raised as defense to Un States' effort to obtain navigational servitude). T is no evidence in the AMAA or elsewhere that gress intended to switch the general rule establi by the *Apfel* plurality for "direct transfer of funds to create so one-sided and unfair a procedure.

Third, the Raisin Marketing Order has been in place for decades, yet this Court has had no opportunity to review its constitutionality under the Takings Clause. As a result, for decades, raisin farmers in California have been forced to turn over a hefty portion of their crop to the federal government in exchange for the "privilege" of selling the remainder. For years, the federal government has defended this blatant appropriation of private property as a justified use of government power because the farmers (supposedly) receive higher prices for the remaining raisins as a result of the comparative scarcity that the government's appropriation creates.

That appropriation flatly violates the Takings Clause irrespective of what one thinks of the soundness of the Raisin Marketing Order's economic logic. The appropriation is all the more outrageous in light of the fact that the Order does not even serve its purported goals, because (1) the government's use of the reserved raisins for various purposes undercuts any benefit that scarcity might otherwise produce for raisin prices, and (2) in a world market where California raisin farmers grow a minority of all raisins, forcible suppression of California raisin production mostly benefits foreign competitors.

The panel's eleventh-hour replacement of its first opinion (disposing of this case on the merits) with a second (disposing of this case on jurisdictional grounds), without giving petitioners the opportunity to be fairly and fully heard, is highly unusual to say the least. The panel's decision provides this Court with an ideal opportunity to address the proper interpretation of *Apfel* and the split of authority within the courts of appeals. At the same time, the panel's jurisdictional holding should not be allowed to de-

prive this Court of an ideal vehicle in which to dress the underling merits issue.

II. The Ninth Circuit's Holding That Petitioners Must Bring Their Takings Clause Defense Under The Tucker Act Conflicts With The Plain Text Of The Statute And A Decision Of The Federal Circuit.

The panel's jurisdictional holding rests on a second erroneous premise, independent of whether an equitable takings defense against a "direct transfer of funds" may be brought directly in federal court. The panel held that petitioners — against whom the USDA assessed a fine in their capacity as "handlers" under the AMAA — could not use the exclusive judicial review procedures in the AMAA for handlers. The panel recognized that the AMAA "'provides an administrative remedy to handlers wishing to challenge marketing orders under the AMAA'" and "'vests the district courts with jurisdiction to review the Secretary's decision.'" Pet. App. 16a (quoting *Lion Raisins*, 416 F.3d at 1370).

But the panel then abruptly determined that "the takings claim before us is brought by [petitioners] in their capacity as handlers but in their capacities as producers; [petitioners] allege that the regulatory scheme at issue takes reserve-tonnage raisins belonging to producers, not property belonging to handlers. This claim is therefore not governed by holdings which address handlers' takings claim, nor is it subject to section [608c(15)'s] administrative exhaustion requirements." Pet. App. 17a. That holding has no basis in the text of the AMAA and conflicts with a decision of the Federal Circuit.

1. Because the Tucker Act is itself a creature

congressional statute, it is well-settled that Congress may "withdraw[] the Tucker Act grant of jurisdiction" by statute. *Apfel*, 524 U.S. at 520. Such withdrawal occurs, for example, when Congress enacts a "specific and comprehensive scheme for administrative and judicial review." *Lion Raisins*, 416 F.3d at 1372.

The AMAA creates such a "specific and comprehensive scheme" for "handlers" of raisins. The statute provides that any "handler" who violates a marketing order is subject to fines and penalties in a final order of the Department of Agriculture, which is "reviewable in the district courts of the United States in any district in which the handler subject to the order is an inhabitant." 7 U.S.C. §§ 608c(14)(A)-(B). That judicial-review provision displaces the Tucker Act where a handler raises the Takings Clause as a defense to enforcement of a marketing order, because (under the statutory scheme) handlers must bring defenses to marketing orders and enforcement decisions in U.S. District Court, not in the Court of Federal Claims under the Tucker Act.

2. Case law supports this interpretation. This Court has held that handlers are required to bring all challenges regarding marketing orders to the USDA. "Even when [such challenges] are formulated in constitutional terms, they are questions of law arising out of, or entwined with, factors that call for understanding of the [ ] industry. And so Congress has provided that the remedy in the first instance must be sought from the Secretary of Agriculture." *Ruzicka*, 329 U.S. at 294.

Likewise, in *Lion Raisins*, a raisin producer brought a Tucker Act claim alleging (in relevant part) that the RAC had taken its storage bins without just

compensation. 416 F.3d at 1370. The Federal Cir held that, because the plaintiff was a "handler" un the AMAA, the Court of Federal Claims lacked ju diction over the claim. The court noted that sect 608c(15) "provides an administrative remedy to h dlers wishing to challenge marketing orders un the AMAA" and "vests the district courts with ju diction to review the Secretary's decision." *Id.* ' court held that "the takings claim may not be brou against the government because the statute provi for an administrative remedy and for judicial rev in district court." *Id.* at 1358; *see also* Charles A Wright *et al.*, 14 *Federal Practice & Procedure* § 3 & n.33 (3d ed. 2010).

3. In light of this statutory scheme and these] cedents, the panel's determination that petitioner who, according to the USDA and the panel, are "h dlers" of raisins — cannot defend against the USI fine is baffling. The panel reasoned that petitio brought their takings defense "not in their capa as handlers but in their capacity as producers," App. 17a, and accordingly could not take advan of the judicial review procedures for raisin hand to challenge a fine that was imposed on them only cause they were held to be handlers.

That holding contradicts the plain text of AMAA's review provision. Under that provis "*[a]ny* handler" seeking to challenge an order, inc ing on constitutional grounds, must exhaust adm trative remedies before the Secretary of Agricult 7 U.S.C. § 608c(15)(A) (emphasis added). Accor to the panel and the USDA, petitioners are "h dlers" under the Raisin Marketing Order. Indee was only in their "capacity as handlers" that could even be subject to the Order and fined in

first place. That is the end of the matter for statutory purposes. The statute makes no provision for separate treatment of "handlers" who are also deemed "producers," such that a "producer-handler" challenging a reserve program in its "capacity as [a] producer[]" is somehow subject to different judicial review provisions. Indeed, it says that a marketing order shall not "be applicable to any producer in his capacity as a producer." § 608c(13)(B). Under such circumstances, the plain language of the statute must control. *See Block v. Cmty. Nutrition Inst.*, 467 U.S. 340, 348 (1984) (noting that "Congress intended that judicial review of market[ing] orders issued under the [AMAA] ordinarily be confined to suits brought by handlers in accordance with 7 U.S.C. § 608c(15)").

Nor does the regulatory scheme provide for any differential treatment. Indeed, to the extent that the statute contains any ambiguity, the USDA has stated that, in interpreting section 608c(15), "[t]he term handler means any person who, by the terms of a marketing order, is subject thereto, or to whom a marketing order is sought to be made applicable." 7 C.F.R. § 900.51(i). The USDA "sought to [make] applicable" the Raisin Marketing Order to petitioners. Petitioners must therefore use the AMAA's review provisions to raise their challenges, as well as defenses, to the USDA's order.

The panel cited two cases from the milk context to support its contrary holding, neither one of which is on point. The AMAA and its accompanying *milk* regulations expressly create a separate category for milk "producer-handlers." *See* 7 U.S.C. § 608c(5). Because the Raisin Marketing Order contains no such "producer-handler" designation, the AMAA's plain language must control. At any rate, the two cases do not

support the panel's contention that petitioners br their claim in their capacity as producers. *Arkan Dairy-Cooperative Association v. USDA*, 573 F.3d 8 (D.C. Cir. 2009), notes in *dicta* that a produc handler "must exhaust before bringing suit in its pacity as a handler, but not when bringing suit in capacity as a producer." *Id.* at 823 n.4. The case c tains no reasoning to support this passing comme nor does it suggest that fines imposed on parties their capacity as handlers must be challenged those same parties in their capacity as produc Indeed, the case does not even involve produc handlers. *Edaleen Dairy, LLC v. Johanns*, 467 F 778 (D.C. Cir. 2006), holds that "Edaleen is cles bringing suit in its capacity as a handler." *Id.* at 7 If anything, that holding supports petitioners' v that they have brought their challenge in their cap ity as handlers in this instance.

4. At any rate, even assuming that "produc handlers" may sometimes bring claims without hausting state remedies, this case would not be appropriate one in which to force a handler to do The USDA imposed fines and penalties on petition in their capacity as handlers, and argued through the litigation that petitioners were handlers. T panel held that petitioners are handlers. It was o when petitioners sought to challenge the fine on T ings Clause grounds that the panel claimed they w doing so "in their capacity as producers." The g ernment cannot have it both ways. If petitioners ordered to pay money to the government in their pacity as handlers, it must be in their capacity handlers that they challenge that order.

5. The panel's error on this issue also present significant and recurring question of wide federal

portance.

First, the opinion below creates a conflict with the Federal Circuit's reasoning in *Lion Raisins*, and presents a serious concern that raisin handlers will have no court in which they may bring their takings claim. *Lion Raisins*, like this case, involved a raisin farmer who was "both a producer and a handler" under the statute and regulations. 416 F.3d at 1360 n.2. The Federal Circuit held that, because the plaintiff was a "handler" under the AMAA, the Court of Federal Claims lacked jurisdiction over this claim. *See id.* at 1358. Indeed, *the government itself* urged the Federal Circuit to adopt this holding. *See id.* at 1371 & n.12 (observing that, "[d]uring oral argument, counsel for the United States acknowledged that [plaintiff] has an administrative remedy and may file a section 608(c)(15)(A) petition seeking redress for the RAC's alleged actions").

To be sure, *Lion Raisins* addressed a claim alleging that the RAC had taken storage bins, not raisins. *Id.* at 1370. But its logic applies equally to jurisdiction over takings of raisins. The panel's interpretation of the AMAA thus creates great confusion about whether and where petitioners — and those similarly situated — may bring their defenses under the Takings Clause.

Second, how and where handlers, producers, and producer-handlers may bring challenges to orders under the AMAA is a question with broad relevance to a wide variety of marketing orders. The panel's holding confuses the clear procedures set forth in the AMAA and the Raisin Marketing Order. It creates the prospect of a conflict between the federal courts and the Court of Federal Claims on takings prin-

ciples, by requiring certain parties to bring their t
ings challenges in administrative proceedings be
the USDA, while requiring others to raise t
claims before the Court of Federal Claims. An
undoes Congress' efforts to channel challenges to
AMAA and marketing orders through the USI
administrative and judicial review procedures.

Third, it bears repeating that the Raisin Mar
ing Order has been in place for decades, yet
Court has had no opportunity to review its const
tionality under the Takings Clause. The p
should not be allowed to throw obstacles in the wa
this Court's review of the merits of this case by ad
ing a distinction between producer-handlers
handlers *simpliciter* that has no basis in law.

CONCLUSION

The petition for a writ of certiorari should
granted.

Respectfully submitted,

BRIAN C. LEIGHTON
Attorney at Law
701 Pollasky Avenue
Clovis, CA 93612
(559) 297-6190

MICHAEL W. MCCONNELL*
ADITYA BAMZAI
Kirkland & Ellis LLP
655 Fifteenth Street, N.W.
Washington, DC 20005
(202) 879-5000
michael.mcconnell@kirkland.c
**Counsel of Record*

Counsel for Petitioners

July 25, 2012

APPENDIX

APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MARVIN D. HORNE and LAURA R. HORNE, d.b.a. RAISIN VALLEY FARMS, a partnership, and d.b.a. RAISIN VALLEY FARMS MARKETING ASSOCIATION, a.k.a. RAISIN VALLEY MARKETING, an unincorporated association; MARVIN D. HORNE; LAURA R. HORNE; DON DURBAHN, and the ESTATE OF RENA DURBAHN, d.b.a. LASSEN VINEYARDS, a partnership,

Plaintiffs-Appellants,

v.

UNITED STATES DEPARTMENT OF AGRICULTURE,

Defendant-Appellee.

No. 10-15270
D.C. No.
1:08-cv-01549-LJO-SMS

AMENDED OPINION

Appeal from the United States District Court
for the Eastern District of California
Lawrence J. O'Neill, District Judge, Presiding

Argued and Submitted
April 14, 2011—Pasadena, California

Filed July 25, 2011
Amended March 12, 2012

Before: Stephen Reinhardt, Michael Daly Hawkins, and
Ronald M. Gould, Circuit Judges.

Opinion by Judge Hawkins

2779

COUNSEL

Brian C. Leighton, Clovis, California, for the plaintiffs-appellants.

Benjamin B. Wagner, United States Attorney, and Benjamin E. Hall, Assistant United States Attorney, Fresno, California, for the defendant-appellee.

OPINION

HAWKINS, Senior Circuit Judge:

This appeal of a United States Department of Agriculture ("USDA") administrative decision asks us to interpret and pass on the constitutionality of a food product reserve program authorized by the Agricultural Marketing Agreement Act of 1937, as amended, 7 U.S.C. § 601 *et seq.* ("AMAA"), and implemented by the Marketing Order Regulating the Handling of Raisins Produced from Grapes Grown in

California, 7 C.F.R. Part 989 ("Raisin Marketing Order" or "the Order"), first adopted in 1949. Farmers Marvin and Laura Horne ("the Hornes"[1]) protest the USDA Judicial Officer's ("JO") imposition of civil penalties and assessments for their failure to comply with the reserve requirements, among other regulatory infractions, contending: (1) they are producers not subject to the Raisin Marketing Order's provisions; (2) even if subject to those provisions, the requirement that they contribute a specified percentage of their annual raisin crop to the government-controlled reserve pool constitutes an uncompensated per se taking in violation of the Fifth Amendment; and (3) the penalties imposed for their "self-help" noncompliance with the Raisin Marketing Order violate the Eighth Amendment Excessive Fines Clause. We affirm.

BACKGROUND

I. Regulatory Framework

Raisins and other agricultural commodities are heavily regulated under federal marketing orders adopted pursuant to the AMAA, a Depression-era statute enacted in response to plummeting commodity prices, market disequilibrium, and the accompanying threat to the nation's credit system. 7

---

[1] Collectively referred to as "the Hornes," the Plaintiffs-Appellants are Marvin and Laura Horne, d/b/a Raisin Valley Farms (a California general partnership), and d/b/a Raisin Valley Farms Marketing Association (a California unincorporated association), together with their business partners Don Durbahn and the Estate of Rena Durbahn, collectively d/b/a Lassen Vineyards (a California general partnership).

U.S.C. § 601 *et seq.*; *see Zuber v. Allen*, 396 U.S. 168, 174-76 (1969); *see generally* Daniel Bensing, "The Promulgation and Implementation of Federal Marketing Orders Regulating Fruit and Vegetable Crops Under the Agricultural Marketing Agreement Act of 1937," 5 *San Joaquin Agric. L. Rev.* 3 (1995). The declared purposes of the AMAA are, inter alia, to help farmers achieve and maintain price parity for their agricultural goods and to protect producers and consumers alike from "unreasonable fluctuations in supplies and prices" by establishing orderly marketing conditions. 7 U.S.C. § 602; *see Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 138 (1963); *Pescosolido v. Block*, 765 F.2d 827, 830 (9th Cir. 1985).

To achieve these goals, the AMAA delegates authority to the Secretary of Agriculture ("Secretary") to issue marketing orders[2] regulating the sale and delivery of agricultural goods, 7 U.S.C. § 608c, principally by imposing production quotas or by restricting the supply of a commodity for sale on

---

[2] According to the specific promulgation procedures mandated by the AMAA, the Secretary may only issue a marketing order if, after providing notice and opportunity for hearing, he finds that "the issuance of such order . . . will tend to effectuate the declared policy" of the Act. 7 U.S.C. § 608c(3)-(4). Such order will not become effective until approved by both (1) the handlers of at least 50 percent of the volume of the commodity covered by the proposed order and (2) either (a) two-thirds of producers of that commodity during a representative period or (b) producers of twothirds of the volume of that commodity during said period. *Id.* § 608c(8); *see id.* § 608b. The Secretary may terminate or suspend any marketing order upon finding it "obstructs or does not tend to effectuate the declared policy" of the Act, or upon request of a majority of active producers during a representative time period. *Id.* § 608c(16).

the open market, either through marketing allotments or reserve pools, *see id.* § 608c(6).[3] The Secretary, in turn, is authorized to delegate to industry committees the power to administer marketing orders. 7 U.S.C. § 608c(7)(C); *see* 7 C.F.R. § 989.35 (2006). Marketing orders under the AMAA apply only to "handlers," i.e., those who process and pack agricultural goods for distribution,[4] and do not

---

[3] Section 8c of the AMAA, 7 U.S.C. § 608c, the key statutory provision dealing with the marketing orders, originated in a 1935 amendment to the Agricultural Adjustment Act of 1933, Pub. L. No. 73-10, 48 Stat. 31 ("AAA"). The Supreme Court invalidated parts of the AAA in 1936, *see United States v. Butler*, 297 U.S. 1, 77 (1936), but Congress quickly reenacted most of the AAA's production-control measures in the AMAA, which the Supreme Court subsequently upheld against various constitutional challenges, *see United States v. Rock Royal Co-op, Inc.*, 307 U.S. 533 (1939).

[4] A "handler" under the Raisin Marketing Order is

> (a) [a]ny processor or packer; (b) any person who places, ships, or continues natural raisins in the current of commerce from within [California] to any point outside thereof; (c) any person who delivers off-grade raisins, other failing raisins or raisin residual material to other than a packer or other than into any eligible non-normal outlet; or (d) any person who blends raisins [subject to certain exceptions].

7 C.F.R. § 989.15. A "packer," in turn, is "any person who, within [California], stems, sorts, cleans, or seeds raisins, grades stemmed raisins, or packages raisins for market as raisins," but does not include a producer who sorts and cleans his own raisins in their unstemmed form. *Id.* § 989.14.

apply to any producer "in his capacity as a producer."[5] 7 U.S.C. §§ 608c(1), 608c(13)(B).[6]

Any handler who fails to comply with the terms of a marketing order is subject to civil forfeiture, as well as possible civil and criminal penalties. 7 U.S.C. §§ 608a(5), 608a(6), 608c(14) (authorizing civil penalties up to $1,000 for each violation, with each day constituting a separate violation).

The Raisin Marketing Order was originally enacted in 1949, *see* 14 Fed. Reg. 5136 (Aug. 18, 1949) (codified, as amended, at 7 C.F.R. Part 989), in an effort to stabilize raisin prices by controlling production surpluses, which since 1920 had consistently been thirty to fifty percent of each year's

---

[5] A "producer" under the Raisin Marketing Order is "any person engaged in a proprietary capacity in the production of grapes which are sun-dried or dehydrated by artificial means until they become raisins." 7 C.F.R. § 989.11.

[6] The regulation of handlers, as opposed to growers, appears to be a vestige of the historical context in which the AMAA was enacted, "an era when small, independent growers were frequently left to the mercy of large handlers who could benefit from their market power and position." Bensing, *supra*, at 8. In the raisin industry, producers generally own the land on which the grapevines are located, and they typically pick the grapes and dry them on trays before selling the unstemmed raisins to packers, or "handlers." Packers then prepare the raisins for commercial sale and distribution by cleaning, stemming, seeding, grading, sorting, and packaging the raisins into containers. Packers then typically sell the packed raisins to wholesalers, distributors, and other dealers for resale and distribution to the public. *Brown v. Parker*, 39 F. Supp. 895, 896-97 (S.D. Cal. 1941), *rev'd on other grounds by Parker v. Brown*, 317 U.S. 341 (1943).

crop. *See Parker*, 317 U.S. at 363-64.[7] Like many other fruit and vegetable orders issued under the AMAA,[8] the Order provides for the establishment of annual reserve pools, as determined by each year's crop yield, thereby removing surplus raisins from sale on the open domestic market and indirectly controlling prices. See 7 U.S.C. § 608c(6)(E); 7 C.F.R. §§ 989.54(d), 989.65. By February 15 of each year, the Raisin Administrative Committee ("RAC")—an industry committee charged with administration of the Raisin Marketing Order,[9] *see* 7 C.F.R. §§ 989.35,

---

[7] The raisin industry has long been an important one in California, where 99.5 percent of the U.S. crop and 40 percent of the world's crop are produced. *See* The California Raisin Industry, http://www.calraisins.org/about/the-raisin-industry/ (last visited July 6, 2011). Raisin prices rose rapidly between 1914 and 1920, peaking in 1921 at $235 per ton. This price increase spurred increased production, which in turn caused prices to plummet back down to between $40 and $60 per ton, even while production continued to expand. As a result of this growing disparity between increasing production and decreasing prices, the industry became "compelled to sell at less than parity prices and in some years at prices regarded by students of the industry as less than the cost of production," finally prompting federal government intervention with the Raisin Marketing Order in 1949. *See Parker*, 317 U.S. at 363-64 & nn.9-10.

[8] For a comparison of the Raisin Marketing Order and marketing orders for other agricultural products, such as walnuts, almonds, prunes, tart cherries, and spearmint, see *Evans v. United States*, 74 Fed. Cl. 554, 558 (2006), *aff'd*, 250 Fed. Appx. 321 (Fed. Cir. 2007).

[9] The RAC is currently comprised of forty-seven industry-nominated representatives appointed by the Secretary, of whom thirty-five represent producers, ten represent handlers, one represents the cooperative bargaining association, and one represents the public. *See* 7 C.F.R. §§ 989.26, 989.29, 989.30.

989.36—recommends the "reserve tonnage" and "free-tonnage" percentages for that year, which the Secretary then promulgates. *See id.* §§ 989.54(d), 989.55. The reserve-tonnage requirement varies from year to year; for example, in the 2002-03 and 2003-04 crop years at issue here, the reserve percentages were set at forty-seven percent and thirty percent of a producer's crop, respectively.

As a result of the Order's reserve program requirements, a producer receives payment (at a pre-negotiated field market price) upon delivery of raisins to a handler only for the free-tonnage raisins, which the handler is then free to sell on the domestic market without restrictions. *See id.* § 989.65. The reserve-tonnage raisins, on the other hand, must be held by the handler in segregated bins "for the account" of the RAC until the RAC sells them to handlers for resale in export markets or directs that they be sold or disposed of in secondary, non-competitive markets, such as school lunch programs, either by direct sale or gift to U.S. agencies or foreign governments. *Id.* §§ 989.54, 989.56, 989.65, 989.67, 989.166, 989.167. The reserve pool sales are used to finance the RAC's administration, and any remaining net proceeds must then be equitably distributed to the producers on a pro rata basis. *See* 7 U.S.C. § 608c(6)(E) (providing for "the equitable distribution of the net return derived from the sale [of reserve-pool raisins] among the persons

---

The RAC is an agent of the federal government but receives no federal appropriations. Instead, it is funded by assessments levied on handlers per ton of raisins sold on the open market and by proceeds from the sale of reserve-tonnage raisins. *See* 7 C.F.R. §§ 989.53, 989.79, 989.80(a), 989.82.

beneficially interested therein"); 7 C.F.R. § 989.66(h). Thus, although producers do not receive payment for reserve-tonnage raisins at the time of delivery to a handler, they retain a limited equity interest in the net proceeds of the RAC's disposition of the reserve, to be paid at a later time.

The RAC is tasked with selling the reserve raisins in a manner "intended to maxim[ize] producer returns and achieve maximum disposition of such raisins by the time reserve tonnage raisins from the subsequent crop year are available," 7 C.F.R. § 989.67(d)(1), but the Hornes complain that they have not received any reserve sale proceeds since the mid-1990s. For example the RAC designated forty-seven percent of the 2002-03 crop as reserve tonnage, which it then sold for $970 per ton, but none of the money the RAC received was paid back to the raisin producers.

In addition to the reserve pool requirement, the Raisin Marketing Order obliges handlers to, *inter alia*: file reports with the RAC, pay assessments to the RAC, and grant the RAC access to records for auditing purposes. *See id.* §§ 989.58, 989.59, 989.73, 989.77, 989.80.

II. The Hornes' Raisin Enterprises

Marvin and Laura Horne have been producing raisins in Fresno and Madera Counties in California since 1969 and in 1999 registered as a California general partnership under the name Raisin Valley Farms. They also own and operate Lassen Vineyards, another registered California general partnership, in partnership with Laura's parents, Don and Rena Durbahn. Disillusioned with a

regulatory scheme they deemed "outdated" a exploitive of farmers, the Hornes looked for ways avoid the Raisin Marketing Order's requiremen particularly its mandatory raisin reserve progra Because those requirements apply only to handle the Hornes implemented a plan to bring their raisi to market without going through a traditio middle-man packer. As part of their plan, t Hornes purchased their own equipment and facilit to clean, stem, sort, and package raisins, which th installed on Lassen Vineyards property in 2001. N only did this facility handle the raisins from Rai Valley Farms and Lassen Vineyards, it a contracted with more than sixty other raisin grow to clean, stem, sort, and in some cases box and sta their raisins for a per-pound fee, typically twe cents per pound.[10] USDA records reflect th Lassen Vineyards packed out more than 1.2 milli pounds of raisins during the 2002-03 crop year a more than 1.9 million pounds during the 2003- crop year.

Meanwhile, the Hornes also organized those six some growers into the Raisin Valley Marketi Association, an unincorporated association th marketed and sold raisins to wholesale customers its members' behalf, while the growers maintain ownership over their own raisins. Raisin Val Marketing then held the sales funds on the grow behalf in a trust account, from which it paid Las Vineyards its packing fees, paid a third-party bro fee, and distributed the net proceeds to the grower

---

[10] This type of arrangement is known as "toll packing." packers do not acquire ownership of the commodity but inst provide a packing service for a fee.

III. Proceedings Below

The Administrator of the Agricultural Marketing Service initiated an enforcement action against the Hornes, alleging violations of the AMAA and failure to comply with the Raisin Marketing Order's various requirements. On appeal from an Administrative Law Judge's decision following an on-the-record hearing, the USDA JO found both Raisin Valley Farms and Lassen Vineyards liable for: (1) twenty violations of 7 C.F.R. § 989.73 (filing of inaccurate reports); (2) fifty-eight violations of 7 C.F.R. § 989.58(d) (failing to obtain incoming inspections); (3) 592 violations of 7 C.F.R. § 989.66 and 7 C.F.R. § 989.166 (failing to hold reserve raisins for the 2002-03 and 2003-04 crop years); (4) two violations of 7 C.F.R. § 989.80 (failing to pay assessments to the RAC); and (5) one violation of 7 C.F.R. § 989.77 (failing to allow the Agricultural Marketing Service access to records). The JO accordingly ordered the Hornes to pay (1) $8,783.39 in unpaid assessments for the 2002-03 and 2003-04 crop years, pursuant to 7 C.F.R. § 989.80(a); (2) $483,843.53, the alleged dollar equivalent of the withheld raisin reserve contributions for the 2002-03 (632,427 pounds) and 2003-04 (611,159 pounds[11]) crop years, pursuant to 7 C.F.R. § 989.166(c); and (3) $202,600 in civil penalties, pursuant to 7 U.S.C. § 608c(14)(B).

The Hornes filed this action in district court seeking judicial review of a final agency decision

---

[11] The Hornes do not challenge the JO's calculation of these figures.

pursuant to 7 U.S.C. § 608c(14)(B).[12] On cr
motions for summary judgment, the district c
granted summary judgment for the USDA, and
Hornes timely appealed.

STANDARDS OF REVIEW

A district court's grant of summary judgmen
reviewed de novo. *Ariz. Life Coal., Inc. v. Stan*
515 F.3d 956, 962 (9th Cir. 2008). Viewing
evidence in the light most favorable to the
moving party, we must determine whether
genuine issues of material fact remain and whe
the district court correctly applied the rele
substantive law. *Lopez v. Smith*, 203 F.3d 1
1131 (9th Cir. 2000) (en banc). We review de no
constitutional challenge to a federal regulation.
v. Rumsfeld, 435 F.3d 980, 984 (9th Cir. 2006) (ci
Gonzales v. Metro. Transp. Auth., 174 F.3d 1
1018 (9th Cir. 1999)). We also review de
whether a fine is unconstitutionally excess
United States v. Mackby, 339 F.3d 1013, 1016
Cir. 2003) (citing *United States v. Bajakajian*,
U.S. 321, 337 n.10 (1998)).

---

[12] In a separate action not the subject of this appeal,
Hornes filed an administrative petition before the Secreta
Agriculture in March 2007 pursuant to 7 U.S.C. § 608c(1
challenging the Raisin Marketing Order and its applicati
them. The JO granted the USDA's motion to dismiss for la
standing. The Hornes filed a complaint in district court
the district court dismissed it for lack of subject m
jurisdiction because it was not timely filed, and we affir
See Horne v. U.S. Dep't of Agric., 395 Fed. Appx. 486 (9th
Sep. 27, 2010) (unpublished).

DISCUSSION

I. Application of the Raisin Marketing Order to the Hornes

For the reasons discussed in the district court's opinion below, we conclude that the Hornes, who admit that their tollpacking business "stems, sorts, cleans," and "packages raisins for market as raisins," 7 C.F.R. § 989.14, satisfy the regulatory definition of a "packer" and are thus "handlers" subject to the Raisin Marketing Order's provisions, *see* 7 C.F.R. § 989.15. *See Horne v. U.S. Dep't of Agric.*, 2009 U.S. Dist. LEXIS 115464, at *20-49 (E.D. Cal. Dec. 11, 2009). The USDA's interpretation of its own regulation is not "plainly erroneous or inconsistent with the regulation" and thus must be given "controlling weight." *See Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945); *accord Auer v. Robbins*, 519 U.S. 452, 461 (1997); *Miller v. Cal. Speedway Corp.*, 536 F.3d 1020, 1028 (9th Cir. 2008). Furthermore, its findings regarding the Hornes' handler operations are supported by substantial evidence and are neither arbitrary nor capricious. *See* 5 U.S.C. § 706(2)(A), (E).

[1] The Hornes argue they are statutorily exempt from regulation because they also satisfy the regulatory definition of a "producer," and the AMAA provides that "[n]o order issued under this chapter shall be applicable to any producer in his capacity as a producer." 7 U.S.C. § 608c(13)(B). However, by expressly limiting the exemption from regulation only to a producer "in his capacity as a producer," the AMAA contemplates that an individual who performs both producer and handler functions may

still be regulated in his capacity as a handler. Eve
the AMAA is considered "silent or ambiguous" on
regulation of individuals who perform both produ
and handler functions, we must give *Chev*
deference to the permissible interpretation of
Secretary of Agriculture, who is charged w
administering the statute. *Chevron, USA, Inc.*
Natural Res. Def. Council, Inc., 467 U.S. 837, 84
(1984); *see* 7 U.S.C. § 608c(1); *see also Mor*
Izquierdo v. Dep't of Homeland Sec., 600 F.3d 1
1086-87 (9th Cir. 2010); *Midway Farms v. U.S. D*
of Agric., 188 F.3d 1136, 1140 n.5 (9th Cir. 19
Other courts have similarly rejected the Hor
argument that a producer who handles his
product for market is statutorily exempt f
regulation under the AMAA. *See, e.g., Freema*
Vance, 319 F.2d 841, 842 (5th Cir. 1963)
curiam); *Ideal Farms, Inc. v. Benson*, 288 F.2d
614 (3d Cir. 1961), *cert. denied*, 372 U.S. 965 (19
Evans, 74 Fed. Cl. at 557-58. Deferring to
agency's permissible interpretation of the statut
we must, we conclude that applying the Ra
Marketing Order to the Hornes in their capacit
handlers was not contrary to the AMAA.

II. Takings Claim

The Hornes argue that, even if they are hand
subject to the Raisin Marketing Order's provisi
the requirement that they contribute a spec
percentage of their annual raisin crop to
government-controlled reserve pool constitutes
uncompensated per se taking in violation of the
Amendment.

[2] The Fifth Amendment Takings Clause does not prohibit the government from taking private property; instead, it imposes conditions on the government's authority to act, providing that *when* government takes private property, pursuant to the lawful exercise of its constitutional powers, (1) it must take for public rather than private use, and (2) it must provide owners with just compensation, as measured by the property owner's loss. *See Brown v. Legal Found. of Wash.*, 538 U.S. 216, 231-32, 235-36 (2003); *First English Evangelical Lutheran Church of Glendale v. Cnty. of Los Angeles*, 482 U.S. 304, 314 (1987). The former condition ensures that government does not abuse its powers by taking private property for another's private gain, *see, e.g., Penn. Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922); the latter ensures that even when government acts in the public interest, it does not "forc[e] some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole," *Armstrong v. United States*, 364 U.S. 40, 49 (1960). As a preliminary matter, we must decide whether we have jurisdiction over the Hornes' takings claim.

[3] As we explained in *Bay View, Inc. v. AHTNA, Inc.*, 105 F.3d 1281 (9th Cir. 1997), the just-compensation requirement does not force the government to provide immediate compensation at the time of a taking; "it must simply 'provide an adequate process for obtaining compensation.' " *Id.* at 1285 (quoting *Williamson Cnty. Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 194 (1985)). The Tucker Act allows parties seeking compensation from the United States to bring suit in the Court of Federal Claims. 28 U.S.C. § 1491(a)(1).

Thus, a takings claim against the fed government must be brought there in the f instance, "unless Congress has withdrawn Tucker Act grant of jurisdiction in the relev statute." *Eastern Enters. v. Apfel*, 524 U.S. 498, (1998) (plurality opinion).

Here, the government contends that the tak claim before us is premature because the Ho have yet to avail themselves of Tucker Act pro available to them in the Court of Federal Cla The Hornes, however, argue that the AM withdraws Tucker Act jurisdiction for tak challenges to AMAA marketing orders enforcement actions, and that the claim is there properly before us.

[4] Section 8c(15) of the AMAA, 7 U.S.C 608c(15), "provides an administrative remedy handlers wishing to challenge marketing or under the AMAA; requires that the Secretary Agriculture] grant a hearing and make a ruling petitions brought by handlers; and vests the dis courts with jurisdiction to review the Secreta decision." *Lion Raisins, Inc. v. United States*, F.3d 1356, 1370 (Fed. Cir. 2005). The case law Hornes cite makes clear that when a handler, producer-handler in its capacity as a hand challenges a marketing order on takings grou Court of Federal Claims Tucker Act jurisdiction g way to section 8c(15)'s comprehensive proced scheme and administrative exhaustion requireme *See id.* at 1370-71 (holding that raisin produ handler asserting a takings claim "only in capacity as a handler" could effectively bring claim in section 8c(15) proceedings and tha

handler "may not seek compensation in the Court of Federal Claims under the guise of a takings claim for what is essentially a challenge to invalid agency action"); *see also United States v. Ruzicka*, 329 U.S. 287, 292-93, 295 (1946) (holding that a handler's challenges to a marketing order could only be raised using the special statutory procedure provided by section 8c(15)); *cf. Wallace v. Hudson-Duncan & Co.*, 98 F.2d 985 (9th Cir. 1938) (asserting jurisdiction over a handler's claim that a walnut marketing order resulted in a taking of its private property).

[5] However, the takings claim before us is brought by the Hornes not in their capacity as handlers but in their capacity as producers; the Hornes allege that the regulatory scheme at issue takes reserve-tonnage raisins belonging to producers, not property belonging to handlers. This claim is therefore not governed by holdings which address handlers' takings claims, nor is it subject to section 8c(15)'s administrative exhaustion requirements. *See Edaleen Dairy, LLC v. Johanns*, 467 F.3d 778, 783 (D.C. Cir. 2006) (distinguishing suits brought in producer-handlers' capacity as producers from suits brought in their capacity as handlers); *Ark. Dairy-Co-op Ass'n, Inc. v. U.S. Dep't of Agric.*, 573 F.3d 815, 823 n.4 (D.C. Cir. 2009) ("Where a single entity acts as a vertically-integrated 'producer-handler,' it must exhaust [section 8c(15) process] before bringing suit in its capacity as a handler, but not when bringing suit in its capacity as a producer.") (citations omitted).

[6] Nothing in the AMAA precludes the Hornes from alleging in the Court of Federal Claims that the reserve program injures them in their capacity as

producers by subjecting them to a taking requi compensation. Thus, they may bring the tak claim there under the Tucker Act. And since may bring a Tucker Act claim, they are *require* bring it before we can properly adjudicate takings issue. *See Bay View*, 105 F.3d at 1285 (Tucker Act . . . [is] an implicit promise by Cong to pay compensation for all takings of pri property for public purposes. . . . Thus, appell takings claim is premature until they have av themselves of the process provided by the Tu Act.") (internal quotation marks and citat omitted).

[7] *Bay View* makes clear that we lack jurisdi to address the merits of the Hornes' takings c where Congress has provided a means compensation. The Hornes' takings argu therefore fails.

III. Excessive Fines Claim

Finally, in connection with their takings argun the Hornes protest the JO's imposition of n $700,000 in combined assessments and fines, w they believe excessively penalizes them, in viol of the Eighth Amendment, for their justified re to deliver their own private property into the h of the government. *See* U.S. Const. amend. ("Excessive bail shall not be required, nor exce fines imposed, nor cruel and unusual punishm inflicted.").

[8] To prevail on an excessive fines clai plaintiff must establish (1) the assessmen imposed, at least in part, for punitive and not m remedial purposes, and (2) the fine is excessiv

"grossly disproportional to the gravity of [the] offense" for which it is imposed. *Bajakajian*, 524 U.S. at 334; *see Engquist v. Or. Dep't of Agric.*, 478 F.3d 985, 1006 (9th Cir. 2007); *Mackby*, 339 F.3d at 1016. Although an excessive punitive civil fine is not beyond the Eighth Amendment's reach, *Hudson v. United States*, 522 U.S. 93, 103 (1997), civil forfeiture that merely "provides a reasonable form of liquidated damages" as compensation for government losses resulting from the unlawful activity is remedial, not punitive, and accordingly does not implicate the Eighth Amendment, *One Lot Emerald Cut Stones & One Ring v. United States*, 409 U.S. 232, 237 (1972); *see United States v. $273,969.04 U.S. Currency*, 164 F.3d 462, 466 (9th Cir. 1999); *Austin v. United States*, 509 U.S. 602, 622 n.14 (1993) ("[A] fine that serves purely remedial purposes cannot be considered 'excessive' in any event.").

[9] Here, the district court correctly determined that the $8,783.39 in unpaid assessments imposed pursuant to 7 C.F.R. § 989.80(a) and the $483,843.53 in compensation for the withheld reserve-tonnage raisins imposed pursuant to 7 C.F.R. § 989.166(c) amounted to remedial rather than punitive forfeitures and that the Excessive Fines Clause therefore is inapplicable to those penalties. The JO's order that the Hornes pay assessments to the RAC was calculated solely to compensate the RAC for the mandatory assessments not paid. *See* 7 C.F.R. § 989.80(a) ("Each handler shall, with respect to free tonnage acquired by him . . . pay to the committee, upon demand, his pro rata share of the expenses . . . which the Secretary finds will be incurred, as aforesaid, by the committee during each crop year . . . ."). Similarly, the JO's order that the Hornes

compensate the RAC for the withheld res tonnage raisins flowed inexorably from anc remedial, non-punitive provision of the regulat *See id.* § 989.166(c) ("A handler who fails to deliv the Committee, upon request, any reserve ton raisins in the quantity and quality for which he become obligated . . . shall compensate Committee for the amount of the loss resulting his failure to so deliver," as determined by a formula.). Calculation of the compensation amou nondiscretionary and is limited by the extent o government's loss. *Cf. $273,969.04*, 164 F.3d at (inferring punitive nature of a sanction where it not limited by the extent of the government's and was tied to commission of a crime). The JO' of the "field price" to calculate the compens amount the Hornes owed the RAC for their with reserve-tonnage raisins was consistent with regulations. *See* 7 C.F.R. § 989.166(c).

[10] The only sanction that implicates Excessive Fines Clause is the $202,600 fine imp pursuant to 7 U.S.C. § 608c(14)(B), but we a agree with the district court that this civil pen less than one-third the authorized statutory am is not "grossly disproportional to the gravity of Hornes'] offense." *Bajakajian*, 524 U.S. at Although we have no set formula for determinin proportionality of a given penalty, relevant fa include the severity of the offense, the stat maximum penalty available, and the harm caus the offense. *Mackby*, 339 F.3d at 1016; *see United States v. 3814 NW Thurman St.*, 164 1191, 1197-98 (9th Cir. 1999).

We have previously recognized that noncompliance with a marketing order's reporting and reserve requirements are serious offenses that threaten the Secretary's ability to regulate a given market and prevent price destabilization, while also unjustly enriching the offenders who profit from selling their reserve-tonnage goods on the open market. *See Balice v. U.S. Dep't of Agric.*, 203 F.3d 684, 693, 695, 698-99 (9th Cir. 2000) (upholding a fine of $225,500 imposed on an almond handler subject to up to $528,000 in fines for violations of various reporting and reserve requirements). Furthermore, that Congress authorized a much steeper fine ($1,000 for each of the Hornes' 673 separate offenses spanning a two-year period, for a total of $673,000) than what the JO actually imposed, while not dispositive, weighs heavily against finding the fine grossly disproportional to the Hornes' offense, for "judgments about the appropriate punishment for an offense belong in the first instance to the legislature." *Bajakajian*, 524 U.S. at 336, 339 n.14; *accord Balice*, 203 F.3d at 699.[13] In light of these factors, we cannot say the district court erred in

---

[13] Although in *Balice* it appears the JO imposed penalties under only 7 U.S.C. § 608c(14) and not under the regulation's forfeiture provisions, whereas here the JO imposed both, nothing in the statutory or regulatory language seems to preclude simultaneous imposition of remedial and punitive sanctions under the respective provisions. To the contrary, 7 C.F.R. § 989.166(c) expressly provides that compensation for failure to deliver reserve-tonnage raisins "shall be in addition to, and not exclusive of, any or all of the remedies or penalties prescribed in the act" for noncompliance with the act or regulation's requirements, and the Hornes do not challenge the legitimacy of this provision.

finding the penalties consistent with the Eighth Amendment.[14]

CONCLUSION

The Hornes are clearly dissatisfied and frustrated with a regulatory scheme they believe no longer serves the interests of the farmers it was designed, in large part, to protect. That being the case, the Hornes may wish to pursue a takings claim in the Court of Federal Claims or attempt to impress upon the Secretary the need for reevaluation of the Raisin Marketing Order. *See* 7 U.S.C. § 608c(16) (prescribing mechanism for termination or suspension of marketing orders). Our role, however, is limited to reviewing the constitutionality and not the wisdom of the current regulation. We find no constitutional infirmity in either the Raisin Marketing Order or the Secretary's application of it to the Hornes, and indeed lack jurisdiction to find such an infirmity on takings grounds until the

---

[14] We also reject the Hornes' contention that 7 U.S.C. § 608c(14)(B) exempts them from liability for their Raisin Marketing Order violations because in 2007 they filed an administrative petition pursuant to 7 U.S.C. § 608c(15)(A). *See* 7 U.S.C. § 608c(14)(B) (immunizing from civil penalty any handler who "in good faith and not for delay" files and prosecutes a qualifying administrative petition). First, this argument was already disposed of in one of our earlier decisions, *see Horne*, 397 Fed. Appx. at 486, and is not properly before us now. Moreover, even if the matter were properly before us, it is without merit. Section 608c(14)(B) only immunizes handlers from penalties otherwise incurred during the pendency of their administrative petition; it does not apply retroactively. Therefore, an administrative petition not filed until 2007 cannot immunize the Hornes from fines relating to their conduct in 2002-04.

Hornes avail themselves of Tucker Act process in the Court of Federal Claims. The summary judgment of the district court is AFFIRMED.

APPENDIX B

FOR PUBLICATION

UNITED STATES COURT OF APPEAL
FOR THE NINTH CIRCUIT

MARVIN D. HORNE and LAURA R. HORNE, d.b.a. RAISIN VALLEY FARMS, a partnership, and d.b.a. RAISIN VALLEY FARMS MARKETING ASSOCIATION, a.k.a. RAISIN VALLEY MARKETING, an unincorporated association; MARVIN D. HORNE; LAURA R. HORNE; DON DURBAHN, and the ESTATE OF RENA DURBAHN, d.b.a. LASSEN VINEYARDS, a partnership,

Plaintiffs-Appellants,

v.

UNITED STATES DEPARTMENT OF AGRICULTURE,

Defendant-Appellee.

No. 10-15270

D.C. No. 1:08-01549-LJO-SI
Eastern Distr
California
Fresno

ORDER

Before: REINHARDT, HAWKINS, and GOULD, Circuit Judges.

The opinion filed July 25, 2011, slip op. 9453, and appearing at ___ F.3d ___, No. 10-15270, 2011 W L 2988902 (9th Cir. 2011), is hereby amended per the Amended Opinion filed concurrently with this Order.

The panel has voted to deny the petition for panel rehearing. Judges Reinhardt and Gould have voted to deny the petition for panel rehearing en banc, and Judge Hawkins has so recommended.

The full court was advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing and the petition for rehearing en banc are **DENIED**.

No further petitions for rehearing or rehearing en banc will be accepted for filing.

APPENDIX C

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MARVIN D. HORNE AND LAURA R HORNE, d.b.a. RAISIN VALLEY FARMS, A PARTNERSHIP, and d.b.a. RAISIN VALLEY FARMS MARKETING ASSOCIATION, a.k.a. RAISIN VALLEY MARKETING, an unincorporated association; MARVIN D. HORNE; LAURA R. HORNE; DON DURBAHN, and the ESTATE OF RENA DURBAHN, d.b.a. LASSEN VINEYARDS, a partnership, *Plaintiffs-Appellants,* v. UNITED STATES DEPARTMENT OF AGRICULTURE, *Defendant-Appellee.*	No. 10-15270 D.C. No. 1:08-cv-01569-LJO-SMS OPINION

Appeal from the United States District Court
for the Eastern District of California
Lawrence J. O'Neill, District Judge, Presiding

Argued and Submitted
April 14, 2011—Pasadena, California

Filed July 25, 2011

Before: Stephen Reinhardt, Michael Daly Hawkins, and Ronald M. Gould, Circuit Judges.

Opinion by Judge Hawkins

COUNSEL

Brian C. Leighton, Clovis, California, for the plaintiffs- appellants.

Benjamin B. Wagner, United States Attorney, and Benjamin E. Hall, Assistant United States Attorney, Fresno, California, for the defendant-appellee.

OPINION

HAWKINS, Senior Circuit Judge:

This appeal of a United States Department of Agriculture ("USDA") administrative decision asks us to interpret and pass on the constitutionality of a food product reserve program authorized by the Agricultural Marketing Agreement Act of 1937, as amended, 7 U.S.C. § 601 et seq. ("AMAA"), and implemented by the Marketing Order Regulating the Handling of Raisins Produced from Grapes Grown in

California, 7 C.F.R. Part 989 ("Raisin Marketing Order" or "the Order"), first adopted in 1949. Farmers Marvin and Laura Horne ("the Hornes"[1]) protest the USDA Judicial Officer's ("JO") imposition of civil penalties and assessments for their failure to comply with the reserve requirements, among other regulatory infractions, contending: (1) they are producers not subject to the Raisin Marketing Order's provisions; (2) even if subject to those provisions, the requirement that they contribute a specified percentage of their annual raisin crop to the government-controlled reserve pool constitutes an uncompensated per se taking in violation of the Fifth Amendment; and (3) the penalties imposed for their "self-help" noncompliance with the Raisin Marketing Order violate the Eighth Amendment Excessive Fines Clause. We affirm.

BACKGROUND

I. Regulatory Framework

Raisins and other agricultural commodities are heavily regulated under federal marketing orders adopted pursuant to the AMAA, a Depression-era statute enacted in response to plummeting commodity prices, market disequilibrium, and the accompanying threat to the nation's credit system. 7

---

[1] Collectively referred to as "the Hornes," the Plaintiffs-Appellants are Marvin and Laura Horne, d/b/a Raisin Valley Farms (a California general partnership), and d/b/a Raisin Valley Farms Marketing Association (a California unincorporated association), together with their business partners Don Durbahn and the Estate of Rena Durbahn, collectively d/b/a Lassen Vineyards (a California general partnership).

U.S.C. § 601 *et seq.*; *see Zuber v. Allen*, 396 U.S. 168, 174-76 (1969); *see generally* Daniel Bensing, "The Promulgation and Implementation of Federal Marketing Orders Regulating Fruit and Vegetable Crops Under the Agricultural Marketing Agreement Act of 1937," 5 *San Joaquin Agric. L. Rev.* 3 (1995). The declared purposes of the AMAA are, inter alia, to help farmers achieve and maintain price parity for their agricultural goods and to protect producers and consumers alike from "unreasonable fluctuations in supplies and prices" by establishing orderly marketing conditions. 7 U.S.C. § 602; *see Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 138 (1963); *Pescosolido v. Block*, 765 F.2d 827, 830 (9th Cir. 1985).

[1] To achieve these goals, the AMAA delegates authority to the Secretary of Agriculture ("Secretary") to issue marketing orders[2] regulating the sale and delivery of agricultural goods, 7 U.S.C. § 608c, principally by imposing production quotas or by restricting the supply of a commodity for sale on the

---

[2] According to the specific promulgation procedures mandated by the AMAA, the Secretary may only issue a marketing order if, after providing notice and opportunity for hearing, he finds that "the issuance of such order . . . will tend to effectuate the declared policy" of the Act. 7 U.S.C. § 608c(3)-(4). Such order will not become effective until approved by both (1) the handlers of at least 50 percent of the volume of the commodity covered by the proposed order and (2) either (a) two-thirds of producers of that commodity during a representative period or (b) producers of two- thirds of the volume of that commodity during said period. *Id.* § 608c(8); *see id.* § 608b. The Secretary may terminate or suspend any marketing order upon finding it "obstructs or does not tend to effectuate the declared policy" of the Act, or upon request of a majority of active producers during a representative time period. *Id.* § 608c(16).

open market, either through marketing allotments or reserve pools, *see id.* § 608c(6).[3] The Secretary, in turn, is authorized to delegate to industry committees the power to administer marketing orders. 7 U.S.C. § 608c(7)(C); *see* 7 C.F.R. § 989.35 (2006). Marketing orders under the AMAA apply only to "handlers," i.e., those who process and pack agricultural goods for distribution,[4] and do not apply to any producer "in his capacity as a producer."[5] 7

---

[3] Section 8c of the AMAA, 7 U.S.C. § 608c, the key statutory provision dealing with the marketing orders, originated in a 1935 amendment to the Agricultural Adjustment Act of 1933, Pub. L. No. 73-10, 48 Stat. 31 ("AAA"). The Supreme Court invalidated parts of the AAA in 1936, *see United States v. Butler*, 297 U.S. 1, 77 (1936), but Congress quickly reenacted most of the AAA's production-control measures in the AMAA, which the Supreme Court subsequently upheld against various constitutional challenges, *see United States v. Rock Royal Co-op, Inc.*, 307 U.S. 533 (1939).

[4] A "handler" under the Raisin Marketing Order is

> (a) [a]ny processor or packer; (b) any person who places, ships, or continues natural raisins in the current of commerce from within [California] to any point outside thereof; (c) any person who delivers off-grade raisins, other failing raisins or raisin residual material to other than a packer or other than into any eligible non-normal outlet; or (d) any person who blends raisins [subject to certain exceptions].

7 C.F.R. § 989.15. A "packer," in turn, is "any person who, within [California], stems, sorts, cleans, or seeds raisins, grades stemmed raisins, or packages raisins for market as raisins," but does not include a producer who sorts and cleans his own raisins in their unstemmed form. *Id.* § 989.14.

[5] A "producer" under the Raisin Marketing Order is "any person engaged in a proprietary capacity in the production of grapes which are sun-dried or dehydrated by artificial means until they become raisins." 7 C.F.R. § 989.11.

U.S.C. §§ 608c(1), 608c(13)(B).[6] Any handler who fails to comply with the terms of a marketing order is subject to civil forfeiture, as well as possible civil and criminal penalties. 7 U.S.C. §§ 608a(5), 608a(6), 608c(14) (authorizing civil penalties up to $1,000 for each violation, with each day constituting a separate violation).

The Raisin Marketing Order was originally enacted in 1949, *see* 14 Fed. Reg. 5136 (Aug. 18, 1949) (codified, as amended, at 7 C.F.R. Part 989), in an effort to stabilize raisin prices by controlling production surpluses, which since 1920 had consistently been thirty to fifty percent of each year's crop. *See* Parker, 317 U.S. at 363-64.[7] Like many

---

[6] The regulation of handlers, as opposed to growers, appears to be a vestige of the historical context in which the AMAA was enacted, "an era when small, independent growers were frequently left to the mercy of large handlers who could benefit from their market power and position." Bensing, *supra*, at 8. In the raisin industry, producers generally own the land on which the grapevines are located, and they typically pick the grapes and dry them on trays before selling the unstemmed raisins to packers, or "handlers." Packers then prepare the raisins for commercial sale and distribution by cleaning, stemming, seeding, grading, sorting, and packaging the raisins into containers. Packers then typically sell the packed raisins to wholesalers, distributors, and other dealers for resale and distribution to the public. *Brown v. Parker*, 39 F. Supp. 895, 896-97 (S.D. Cal. 1941), *rev'd on other grounds by Parker v. Brown*, 317 U.S. 341 (1943).

[7] The raisin industry has long been an important one in California, where 99.5 percent of the U.S. crop and 40 percent of the world's crop are produced. See The California Raisin Industry, http://www.calraisins.org/ about/the-raisin-industry/ (last visited July 6, 2011). Raisin prices rose rapidly between 1914 and 1920, peaking in 1921 at $235 per ton. This price increase spurred increased production, which in turn caused

other fruit and vegetable orders issued under the AMAA,[8] the Order provides for the establishment of annual reserve pools, as determined by each year's crop yield, thereby removing surplus raisins from sale on the open domestic market and indirectly controlling prices. *See* 7 U.S.C. § 608c(6)(E); 7 C.F.R. §§ 989.54(d), 989.65. By February 15 of each year, the Raisin Administrative Committee ("RAC")—an industry committee charged with administration of the Raisin Marketing Order,[9] *see* 7 C.F.R. §§ 989.35, 989.36—recommends the "reserve-tonnage" and "free-tonnage" percentages for that

---

prices to plummet back down to between $40 and $60 per ton, even while production continued to expand. As a result of this growing disparity between increasing production and decreasing prices, the industry became "compelled to sell at less than parity prices and in some years at prices regarded by students of the industry as less than the cost of production," finally prompting federal government intervention with the Raisin Marketing Order in 1949. *See Parker*, 317 U.S. at 363-64 & nn.9-10.

[8] For a comparison of the Raisin Marketing Order and marketing orders for other agricultural products, such as walnuts, almonds, prunes, tart cherries, and spearmint, see *Evans v. United States*, 74 Fed. Cl. 554, 558 (2006), *aff'd*, 250 Fed. Appx. 321 (Fed. Cir. 2007).

[9] The RAC is currently comprised of forty-seven industry-nominated representatives appointed by the Secretary, of whom thirty-five represent producers, ten represent handlers, one represents the cooperative bargaining association, and one represents the public. *See* 7 C.F.R. §§ 989.26, 989.29, 989.30. The RAC is an agent of the federal government but receives no federal appropriations. Instead, it is funded by assessments levied on handlers per ton of raisins sold on the open market and by proceeds from the sale of reserve-tonnage raisins. *See* 7 C.F.R. §§ 989.53, 989.79, 989.80(a), 989.82.

year, which the Secretary then promulgates. *See id.* §§ 989.54(d), 989.55. The reserve-tonnage requirement varies from year to year; for example, in the 2002-03 and 2003-04 crop years at issue here, the reserve percentages were set at forty-seven percent and thirty percent of a producer's crop, respectively.

As a result of the Order's reserve program requirements, a producer receives payment (at a pre-negotiated field market price) upon delivery of raisins to a handler only for the free- tonnage raisins, which the handler is then free to sell on the domestic market without restrictions. *See id.* § 989.65. The reserve-tonnage raisins, on the other hand, must be held by the handler in segregated bins "for the account" of the RAC until the RAC sells them to handlers for resale in export markets or directs that they be sold or disposed of in secondary, non-competitive markets, such as school lunch programs, either by direct sale or gift to U.S. agencies or foreign governments. *Id.* §§ 989.54, 989.56, 989.65, 989.67, 989.166, 989.167. The reserve pool sales are used to finance the RAC's administration, and any remaining net proceeds must then be equitably distributed to the producers on a pro rata basis. *See* 7 U.S.C. § 608c(6)(E) (providing for "the equitable distribution of the net return derived from the sale [of reserve-pool raisins] among the persons beneficially interested therein"); 7 C.F.R. § 989.66(h). Thus, although producers do not receive payment for reserve-tonnage raisins at the time of delivery to a handler, they retain a limited equity interest in the net proceeds of the RAC's disposition of the reserve, to be paid at a later time.

The RAC is tasked with selling the reserve raisins in a manner "intended to maxim[ize] producer returns and achieve maximum disposition of such raisins by the time reserve tonnage raisins from the subsequent crop year are available," 7 C.F.R. § 989.67(d)(1), but the Hornes complain that they have not received any reserve sale proceeds since the mid-1990s. For example the RAC designated forty-seven percent of the 2002-03 crop as reserve tonnage, which it then sold for $970 per ton, but none of the money the RAC received was paid back to the raisin producers.

In addition to the reserve pool requirement, the Raisin Marketing Order obliges handlers to, *inter alia*: file reports with the RAC, pay assessments to the RAC, and grant the RAC access to records for auditing purposes. *See id.* §§ 989.58, 989.59, 989.73, 989.77, 989.80.

II. The Hornes' Raisin Enterprises

Marvin and Laura Horne have been producing raisins in Fresno and Madera Counties in California since 1969 and in 1999 registered as a California general partnership under the name Raisin Valley Farms. They also own and operate Lassen Vineyards, another registered California general partnership, in partnership with Laura's parents, Don and Rena Durbahn. Disillusioned with a regulatory scheme they deemed "outdated" and exploitive of farmers, the Hornes looked for ways to avoid the Raisin Marketing Order's requirements, particularly its mandatory raisin reserve program. Because those requirements apply only to handlers, the Hornes implemented a plan to bring their raisins

to market without going through a traditional middle-man packer. As part of their plan, the Hornes purchased their own equipment and facilities to clean, stem, sort, and package raisins, which they installed on Lassen Vineyards property in 2001. Not only did this facility handle the raisins from Raisin Valley Farms and Lassen Vineyards, it also contracted with more than sixty other raisin growers to clean, stem, sort, and in some cases box and stack their raisins for a per-pound fee, typically twelve cents per pound.[10] USDA records reflect that Lassen Vineyards packed out more than 1.2 million pounds of raisins during the 2002-03 crop year and more than 1.9 million pounds during the 2003-04 crop year.

Meanwhile, the Hornes also organized these sixty-some growers into the Raisin Valley Marketing Association, an unincorporated association that marketed and sold raisins to wholesale customers on its members' behalf, while the growers maintained ownership over their own raisins. Raisin Valley Marketing then held the sales funds on the growers' behalf in a trust account, from which it paid Lassen Vineyards its packing fees, paid a third-party broker fee, and distributed the net proceeds to the growers.

III. Proceedings Below

The Administrator of the Agricultural Marketing Service initiated an enforcement action against the Hornes, alleging violations of the AMAA and failure

---

[10] This type of arrangement is known as "toll packing." Toll packers do not acquire ownership of the commodity but instead provide a packing service for a fee.

to comply with the Raisin Marketing Order's various requirements. On appeal from an Administrative Law Judge's decision following an on-the- record hearing, the USDA JO found both Raisin Valley Farms and Lassen Vineyards liable for: (1) twenty violations of 7 C.F.R. § 989.73 (filing of inaccurate reports); (2) fifty-eight violations of 7 C.F.R. § 989.58(d) (failing to obtain incoming inspections); (3) 592 violations of 7 C.F.R. § 989.66 and 7 C.F.R. § 989.166 (failing to hold reserve raisins for the 2002-03 and 2003-04 crop years); (4) two violations of 7 C.F.R. § 989.80 (failing to pay assessments to the RAC); and (5) one violation of 7 C.F.R. § 989.77 (failing to allow the Agricultural Marketing Service access to records). The JO accordingly ordered the Hornes to pay (1) $8,783.39 in unpaid assessments for the 2002-03 and 2003-04 crop years, pursuant to 7 C.F.R. § 989.80(a); (2) $483,843.53, the alleged dollar equivalent of the withheld raisin reserve contributions for the 2002-03 (632,427 pounds) and 2003-04 (611,159 pounds[11]) crop years, pursuant to 7 C.F.R. § 989.166(c); and (3) $202,600 in civil penalties, pursuant to 7 U.S.C. § 608c(14)(B).

The Hornes filed this action in district court seeking judicial review of a final agency decision pursuant to 7 U.S.C. § 608c(14)(B).[12] On cross-

---

[11] The Hornes do not challenge the JO's calculation of these figures.

[12] In a separate action not the subject of this appeal, the Hornes filed an administrative petition before the Secretary of Agriculture in March 2007 pursuant to 7 U.S.C. § 608c(15)(A) challenging the Raisin Marketing Order and its application to them. The JO granted the USDA's motion to dismiss for lack of standing. The Hornes filed a complaint in district court, but the

motions for summary judgment, the district court granted summary judgment for the USDA, and the Hornes timely appealed.

STANDARDS OF REVIEW

A district court's grant of summary judgment is reviewed de novo. *Ariz. Life Coal., Inc. v. Stanton*, 515 F.3d 956, 962 (9th Cir. 2008). Viewing the evidence in the light most favorable to the non-moving party, we must determine whether any genuine issues of material fact remain and whether the district court correctly applied the relevant substantive law. *Lopez v. Smith*, 203 F.3d 1122, 1131 (9th Cir. 2000) (en banc). We review de novo a constitutional challenge to a federal regulation. *Doe v. Rumsfeld*, 435 F.3d 980, 984 (9th Cir. 2006) (citing *Gonzales v. Metro. Transp. Auth.*, 174 F.3d 1016, 1018 (9th Cir. 1999)). We also review de novo whether a fine is unconstitutionally excessive. *United States v. Mackby*, 339 F.3d 1013, 1016 (9th Cir. 2003) (*citing United States v. Bajakajian*, 524 U.S. 321, 337 n.10 (1998)).

DISCUSSION

I. Application of the Raisin Marketing Order to the Hornes

For the reasons discussed in the district court's opinion below, we conclude that the Hornes, who admit that their toll- packing business "stems, sorts,

---

district court dismissed it for lack of subject matter jurisdiction because it was not timely filed, and we affirmed. *See Horne v. U.S. Dep't of Agric.*, 395 Fed. Appx. 486 (9th Cir. Sep. 27, 2010) (unpublished).

cleans," and "packages raisins for market as raisins," 7 C.F.R. § 989.14, satisfy the regulatory definition of a "packer" and are thus "handlers" subject to the Raisin Marketing Order's provisions, *see* 7 C.F.R. § 989.15. *See Horne v. U.S. Dep't of Agric.*, 2009 U.S. Dist. LEXIS 115464, at *20-49 (E.D. Cal. Dec. 11, 2009). The USDA's interpretation of its own regulation is not "plainly erroneous or inconsistent with the regulation" and thus must be given "controlling weight." *See Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945); *accord Auer v. Robbins*, 519 U.S. 452, 461 (1997); *Miller v. Cal. Speedway Corp.*, 536 F.3d 1020, 1028 (9th Cir. 2008). Furthermore, its findings regarding the Hornes' handler operations are supported by substantial evidence and are neither arbitrary nor capricious. *See* 5 U.S.C. § 706(2)(A), (E).

[2] The Hornes argue they are statutorily exempt from regulation because they also satisfy the regulatory definition of a "producer," and the AMAA provides that "[n]o order issued under this chapter shall be applicable to any producer in his capacity as a producer." 7 U.S.C. § 608c(13)(B). However, by expressly limiting the exemption from regulation only to a producer "in his capacity as a producer," the AMAA contemplates that an individual who performs both producer and handler functions may still be regulated in his capacity as a handler. Even if the AMAA is considered "silent or ambiguous" on the regulation of individuals who perform both producer and handler functions, we must give *Chevron* deference to the permissible interpretation of the Secretary of Agriculture, who is charged with administering the statute. *Chevron, USA, Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43

(1984); *see* 7 U.S.C. § 608c(1); *see also Morales-Izquierdo v. Dep't of Homeland Sec.*, 600 F.3d 1076, 1086-87 (9th Cir. 2010); *Midway Farms v. U.S. Dep't of Agric.*, 188 F.3d 1136, 1140 n.5 (9th Cir. 1999). Other courts have similarly rejected the Hornes' argument that a producer who handles his own product for market is statutorily exempt from regulation under the AMAA. *See*, e.g., *Freeman v. Vance*, 319 F.2d 841, 842 (5th Cir. 1963) (per curiam); *Ideal Farms, Inc. v. Benson*, 288 F.2d 608, 614 (3d Cir. 1961), *cert. denied*, 372 U.S. 965 (1963); *Evans*, 74 Fed. Cl. at 557-58. Deferring to the agency's permissible interpretation of the statute, as we must, we conclude that applying the Raisin Marketing Order to the Hornes in their capacity as handlers was not contrary to the AMAA.

II. Takings Claim

Does the Raisin Marketing Order's reserve requirement program constitute a physical, per se taking of the Hornes' personal property without just compensation, in violation of the Fifth Amendment? *See* U.S. Const. amend. V ("[N]or shall private property be taken for public use, without just compensation."). We join the Court of Federal Claims, which not long ago decided this exact question, in holding it does not. *See Evans*, 74 Fed. Cl. at 562-64; *cf. Cal-Almond, Inc. v. United States*, 30 Fed. Cl. 244, 246-47 (1994) (rejecting a takings claim against a similar reserve program under the almond marketing order).

The Fifth Amendment Takings Clause does not itself authorize the taking of private property, nor does it prohibit the government from doing so.

Instead, it imposes conditions on the government's authority to act, providing that when government takes private property, pursuant to the lawful exercise of its constitutional powers, (1) it must take for public rather than private use, and (2) it must provide owners with just compensation, as measured by the property owner's loss. *See Brown v. Legal Found. of Wash.*, 538 U.S. 216, 231-32 235-36 (2003); *First English Evangelical Lutheran Church of Glendale v. Cnty. of L.A.*, 482 U.S. 304, 314 (1987). The former condition ensures that government does not abuse its powers by taking private property for another's private gain, *see, e.g., Penn. Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922); the latter ensures that even when government acts in the public interest, it does not "forc[e] some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole," *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

[3] In its earliest days, the Takings Clause was thought to apply only to "direct appropriation of property, or the functional equivalent of a practical ouster of the owner's possession," *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 537 (2005) (internal quotation marks and brackets omitted), *i.e.*, "physical takings." *See Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1028 n.15 (1992). Over the years, its reach has extended to accommodate the modern reality that "government regulation of private property may, in some instances, be so onerous that its effect is tantamount to a direct appropriation or ouster." *Lingle*, 544 U.S. at 537; *see* also *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 427-38 (1982) (surveying evolution of the takings doctrine). Most takings challenges to governmental

regulations must undergo an ad hoc, fact-intensive inquiry focusing on (1) the economic impact of the regulation on the claimant; (2) the extent to which the regulation interferes with reasonable investment-backed expectations; and (3) the character of the governmental action. *Penn Cent. Transp. Co. v. N.Y.C.*, 438 U.S. 104, 124 (1978). Only in two situations does the Supreme Court recognize that regulatory action per se "goes too far" in frustrating property rights, Mahon, 260 U.S. at 415: first, "where government requires an owner to suffer a permanent physical invasion of her property[,] however minor," *Lingle*, 544 U.S. at 538; *see, e.g.*, *Loretto*, 458 U.S. at 438 (compensation required where state law forced landlords to permit cable companies to install cable facilities occupying one and one-half square feet of rooftops); *Kaiser Aetna v. United States*, 444 U.S. 164, 179-80 (1979) (same for imposition of navigational servitude upon private marina); *United States v. Causby*, 328 U.S. 256, 265 & n.10 (1946) (same for physical invasions of airspace); and second, where government regulation "denies all economically beneficial or productive use of land," Lucas, 505 U.S. at 1015 (emphasis added) (compensation required where state law barring construction of any permanent habitable structures on beachfront property rendered land parcels "valueless"). When government action results in such a "total regulatory taking[ ]," *id.* at 1026, as opposed to a mere "partial regulatory taking[ ]," *Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 326 (2002), a property owner is categorically entitled to compensation, without resort to the usual case-specific inquiry.

[4] The Hornes, however, do not claim that the Raisin Marketing Order effects a regulatory taking, partial or total. Instead, they insist we need look no further than the RAC's annual "direct appropriation" of their reserve-tonnage raisins to conclude this is a classic *physical* taking. Though the simplicity of their logic has some understandable appeal—their raisins are personal property, personal property is protected by the Fifth Amendment, and each year the RAC "takes" some of their raisins, at least in the colloquial sense—their argument rests on a fundamental misunderstanding of the nature of property rights and instead clings to a phrase divorced from context.

It is undisputed that the Fifth Amendment guarantees compensation for the taking not only of real property but also of personal property and even intangible property. *See Phillips v. Wash. Legal Found.*, 524 U.S. 156, 172 (1998) (interest earned on lawyers' trust account is a protected private property); *Brown*, 538 U.S. at 235 (same); *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1001-04 (1984) (same for trade secrets). No one suggests the government could come onto the Hornes' farm uninvited and walk off with forty-seven percent of their crops without offering just compensation, even if the seizure itself were justified (for example, as a wartime measure). *See Dolan v. City of Tigard*, 512 U.S. 374, 384 (1994); *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 831 (1987); *United States v. Pewee Coal Co.*, 341 U.S. 114, 115-17 (1951) (government's wartime seizure and operation of a coal mine to prevent a national coal miners' strike constituted a compensable taking). Certainly, that government action is authorized does not immunize it from a

takings claim; indeed, the Takings Clause *presupposes* that the government has taken lawfully. *Lingle*, 544 U.S. at 543; *see Kaiser Aetna*, 444 U.S. at 172 (no "blanket exception" to the Takings Clause simply because Congress has acted under lawful authority). If the Raisin Marketing Order authorized an uninvited, forcible 'taking of the Hornes' crops, there is no question that the government would have "a categorical duty to compensate the [Hornes], regardless of whether the interest that is taken constitutes an entire parcel [i.e., all their crops,] or merely a part thereof." Tahoe-Sierra, 535 U.S. at 322 (internal citation omitted).

[5] But a forcible taking is not what the Raisin Marketing Order accomplishes. Far from compelling a physical taking of the Hornes' tangible property, the Raisin Marketing Order applies to the Hornes only insofar as they voluntarily choose to send their raisins into the stream of interstate commerce. Simply put, it is a use restriction, not a direct appropriation. The Secretary of Agriculture did not authorize a forced seizure of forty-seven percent of the Hornes' 2002-03 crops and thirty percent of their 2003-04 crops, but rather imposed a condition on the Hornes' *use* of their crops by regulating their sale. As we explained in a similar context over seventy years ago, the Raisin Marketing Order "contains no absolute requirement of the delivery of [reserve-tonnage raisins] to the [RAC]" but rather only "a conditional one." *Wallace v. Hudson-Duncan & Co.*, 98 F.2d 985, 989 (9th Cir. 1938) (rejecting a takings challenge to a reserve requirement under the walnut marketing order).

In rejecting a claim that a local mobile home rent control ordinance amounted to a physical taking of park owners' property interest, the Supreme Court similarly explained that "[t]he government effects a physical taking only where it requires the landowner to submit to the physical occupation of his land." *Yee v. City of Escondido*, 503 U.S. 519, 527 (1992) (emphasis in original). Emphasizing that the "'element of required acquiescence is at the heart of the concept of occupation,'" *id.* (*quoting FCC v. Fla. Power Corp.*, 480 U.S. 245, 252 (1987)), the Court explained that the mobile park owners had no physical takings claim because they voluntarily rented their land to mobile home owners and thus acquiesced in the regulation not under government compulsion but of their own accord, *id.* at 527-28. This same logic was used to defeat a takings challenge to a statute authorizing the public disclosure of private data submitted by applicants as a condition on registering their pesticides. *See Ruckelshaus*, 467 U.S. at 1007. Even though the applicants had a recognized interest in their intellectual property, the Supreme Court reasoned that "a voluntary submission of data by an applicant in exchange for the economic advantages of a registration can hardly be called a taking," so long as the disclosure condition was rationally related to a legitimate government interest and the applicant was made aware of the condition in advance. *Id.*

[6] There are, of course, limits to what conditions the government can constitutionally impose. The government "may not require a person to give up a constitutional right—[for example,] the right to receive just compensation when property is taken for a public use—in exchange for a discretionary benefit

conferred by the government where the benefit has little or no relationship to the property." *Dolan*, 512 U.S. at 385. Thus, where the government conditioned the grant of a coastal development permit on the granting of a public easement bearing no nexus to the original purpose of the building restriction, the Supreme Court held that the government could not avoid paying compensation simply by shoehorning a taking into an unrelated exercise of its police powers. *Nollan*, 483 U.S. at 837; *see* also *Dolan*, 512 U.S. at 395 (holding that city could not require development permit applicant to grant a public pathway easement where there was no reasonable relationship between the proposed development and the condition imposed). Here, however, the condition imposed is rationally related to the government's legitimate interest in controlling the supply of raisins on the domestic market so as to prevent price destabilization and corollary effects on the economy, and the Hornes had ample prior notice of the condition before they voluntarily decided to enter the raisin market.

Nevertheless, the Hornes insist their so-called "voluntary" subjection to the Raisin Marketing Order is in fact the product of a Hobson's choice, for they have no economically viable alternative to selling their raisins and therefore must suffer the complete and total taking of a designated percentage of their raisins under compulsion. Their argument is founded on an erroneous belief that they have a property right to "market their [raisins] free of regulatory controls," *Cal-Almond*, 30 Fed. Cl. at 246, and is unavailing.

Admittedly, the Raisin Marketing Order's expansive definition of "handler," which includes anyone who "packs" raisins for sale even if the raisins are sold exclusively within the state of California, renders its regulatory reach less escapable than the marketing order at issue in *Wallace*, which did not apply to walnuts sold within the state of production. *See Wallace*, 98 F.2d at 989. Nonetheless, we noted in Wallace a "distinction between the direct appropriation of property and the destruction of property values in the exercise of governmental power," *id.*, observing that the regulation would remain valid "[e]ven if the [c]ompany were able to show . . . that the only alternative to making delivery to the [government] of surplus walnuts or their 'credit value' would be to go out of business," *id.* at 990.

[7] This seemingly draconian result flows from the long- standing notion that "some [property] values are enjoyed under an implied limitation and must yield" to the government's regulatory powers. *Mahon*, 260 U.S. at 413. The implied restrictions on our property rights "are the burdens we all must bear in exchange for the advantage of living and doing business in a civilized community," *Ruckelshaus*, 467 U.S. at 1007 (internal quotation marks and citations omitted). Our takings jurisprudence is "guided by the understandings of our citizens regarding the content of, and the State's power over, the 'bundle of rights' that they acquire when they obtain title to property," *Lucas*, 505 U.S. at 1027, and not every restriction on our use of property amounts to a compensable taking.

Although the Fifth Amendment, as previously discussed, protects real and personal property alike, the personal property "bundle of rights" is not coextensive with the bundle comprising real property, as they are informed by different background principles. *See id.* at 1027-30. Consequently, the same government action may effect a taking when applied to one type of property but not the other. Whereas a regulation depriving a landowner of "all economically beneficial uses" of his land effects a categorical taking, *see Lucas*, 505 U.S. at 1019 (emphasis in original), the same may not necessarily be true of a regulation banning the sale of a commercial product, *see, e.g., Andrus v. Allard*, 444 U.S. 51, 66-67 (1979) (holding that prohibition on sale of eagle feathers was not a taking); *Ruppert v. Caffey*, 251 U.S. 264 (1920) (upholding sales ban on nonintoxicating alcoholic beverages against takings challenge); *James Everard's Breweries v. Day*, 265 U.S. 545 (1924) (upholding ban on sale of all liquor, including liquor lawfully manufactured before passage of the statute). While the total deprivation of beneficial use of land carries a "heightened risk that private property is being pressed into some form of public service under the guise of mitigating serious public harm," *Lucas*, 505 U.S. at 1018, when it comes to personal property, "the State's traditionally high degree of control over commercial dealings" ought to put a property owner on notice "of the possibility that new regulation might even render his property economically worthless (at least if the property's only economically productive use is sale or manufacture for sale)," *id.* at 1027-28. Thus, although the right to sell their raisins is a significant one, it is but one "strand" in the Hornes' bundle, and

even the destruction of that single strand would not amount to a taking without undergoing Penn Central ad hoc review. *See Andrus*, 444 U.S. at 65-66 ("significant restriction . . . imposed on one means of disposing of the artifacts" does not amount to a taking); *see also Rock Royal*, 307 U.S. at 572 ("As the Congress would have, clearly, the right to permit only limited amounts of milk to move in interstate commerce, . . . it might permit the movement on terms of pool settlement . . . .").

[8] In any event, the Raisin Marketing Order does not destroy that strand and does not deny raisin farmers all economically beneficial use of their raisins, for the regulation does not ban the sale of raisins altogether but only requires the delivery to the RAC of a certain percentage of raisins prepared for market. The Hornes insist the regulation effects a total taking of those reserve-tonnage raisins, but they ignore the Supreme Court's repeated admonition that we must consider the regulation's impact on "the parcel as a whole" rather than "divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated." *Penn Cent.*, 438 U.S. at 130-131 & n.27; *accord Tahoe-Sierra*, 535 U.S. at 327. For example, where a statute required coal companies to leave unmined fifty percent of their coal beneath certain structures to prevent land subsidence, the Supreme Court found no taking, reasoning that "[t]he 27 million tons of coal do not constitute a separate segment of property for takings law purposes." *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 498 (1987).

[9] Accordingly, the Hornes' argument that they have suffered a complete and total taking of their reserve-tonnage raisins is squarely foreclosed by case law, for the relevant parcel here is the entirety of their annual crop, not the individual raisins destined for the reserve pool. Even if in absolute terms they number in the billions, the reserve-tonnage raisins are but a designated percentage of a producer's total annual crop handled for sale in the domestic market. Furthermore, the Hornes have put forth no evidence that the Raisin Marketing Order "makes it impossible for [them] to profitably engage in their business." *Id.* at 485. We imagine it would be difficult for the Hornes to gather such evidence, given that the reserve-pool restrictions on the market supply of raisins serve to *raise* prices for the Hornes' free-tonnage raisins, ostensibly making their business *more* profitable than it would be in an unregulated free market.

[10] The Hornes have suffered no compensable *physical* taking of any portion of their crops, and thus the Fifth Amendment poses no obstacle to the Secretary's enforcement of the Raisin Marketing Order against them. Because the Hornes do not advance the alternative theory that the Raisin Marketing Order effects a regulatory taking, we leave that question for another day.

III. Excessive Fines Claim

Finally, in connection with their takings argument, the Hornes protest the JO's imposition of nearly $700,000 in combined assessments and fines, which they believe excessively penalizes them, in violation of the Eighth Amendment, for their justified refusal

to deliver their own private property into the hands of the government. *See* U.S. Const. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.").

[11] To prevail on an excessive fines claim, a plaintiff must establish (1) the assessment is imposed, at least in part, for punitive and not merely remedial purposes, and (2) the fine is excessive, or "grossly disproportional to the gravity of [the] offense" for which it is imposed. *Bajakajian*, 524 U.S. at 334; *see Engquist v. Or. Dep't of Agric.*, 478 F.3d 985, 1006 (9th Cir. 2007); *Mackby*, 339 F.3d at 1016. Although an excessive punitive civil fine is not beyond the Eighth Amendment's reach, *Hudson v. United States*, 522 U.S. 93, 103 (1997), civil forfeiture that merely "provides a reasonable form of liquidated damages" as compensation for government losses resulting from the unlawful activity is remedial, not punitive, and accordingly does not implicate the Eighth Amendment, *One Lot Emerald Cut Stones & One Ring v. United States*, 409 U.S. 232, 237 (1972); *see United States v. $273,969.04 U.S. Currency*, 164 F.3d 462, 466 (9th Cir. 1999); *Austin v. United States*, 509 U.S. 602, 622 n.14 (1993) ("[A] fine that serves purely remedial purposes cannot be considered 'excessive' in any event.").

[12] Here, the district court correctly determined that the $8,783.39 in unpaid assessments imposed pursuant to 7 C.F.R. § 989.80(a) and the $483,843.53 in compensation for the withheld reserve-tonnage raisins imposed pursuant to 7 C.F.R. § 989.166(c) amounted to remedial rather than punitive forfeitures and that the Excessive Fines Clause

therefore is inapplicable to those penalties. The JO's order that the Hornes pay assessments to the RAC was calculated solely to compensate the RAC for the mandatory assessments not paid. *See* 7 C.F.R. § 989.80(a) ("Each handler shall, with respect to free tonnage acquired by him . . . pay to the committee, upon demand, his pro rata share of the expenses . . . which the Secretary finds will be incurred, as aforesaid, by the committee during each crop year . . . ."). Similarly, the JO's order that the Hornes compensate the RAC for the withheld reserve-tonnage raisins flowed inexorably from another remedial, non-punitive provision of the regulations. *See id.* § 989.166(c) ("A handler who fails to deliver to the Committee, upon request, any reserve tonnage raisins in the quantity and quality for which he has become obligated . . . shall compensate the Committee for the amount of the loss resulting from his failure to so deliver," as determined by a fixed formula.). Calculation of the compensation amount is nondiscretionary and is limited by the extent of the government's loss. Cf. $273,969.04, 164 F.3d at 466 (inferring punitive nature of a sanction where it was not limited by the extent of the government's loss and was tied to commission of a crime). The JO's use of the "field price" to calculate the compensatory amount the Hornes owed the RAC for their withheld reserve-tonnage raisins was consistent with the regulations. *See* 7 C.F.R. § 989.166(c).

[13] The only sanction that implicates the Excessive Fines Clause is the $202,600 fine imposed pursuant to 7 U.S.C. § 608c(14)(B), but we again agree with the district court that this civil penalty, less than one-third the authorized statutory amount,

is not "grossly disproportional to the gravity of [the Hornes'] offense." *Bajakajian*, 524 U.S. at 334. Although we have no set formula for determining the proportionality of a given penalty, relevant factors include the severity of the offense, the statutory maximum penalty available, and the harm caused by the offense. *Mackby*, 339 F.3d at 1016; *see also United States v. 3814 NW Thurman St.*, 164 F.3d 1191, 1197-98 (9th Cir. 1999).

We have previously recognized that noncompliance with a marketing order's reporting and reserve requirements are serious offenses that threaten the Secretary's ability to regulate a given market and prevent price destabilization, while also unjustly enriching the offenders who profit from selling their reserve-tonnage goods on the open market. *See Balice v. U.S. Dep't of Agric.*, 203 F.3d 684, 693, 695, 698-99 (9th Cir. 2000) (upholding a fine of $225,500 imposed on an almond handler subject to up to $528,000 in fines for violations of various reporting and reserve requirements). Furthermore, that Congress authorized a much steeper fine ($1,000 for each of the Hornes' 673 separate offenses spanning a two-year period, for a total of $673,000) than what the JO actually imposed, while not dispositive, weighs heavily against finding the fine grossly disproportional to the Hornes' offense, for "judgments about the appropriate punishment for an offense belong in the first instance to the legislature." *Bajakajian*, 524 U.S. at 336, 339 n.14; *accord Balice*, 203 F.3d at 699.[13] In light of these

---

[13] Although in *Balice* it appears the JO imposed penalties under only 7 U.S.C. § 608c(14) and not under the regulation's forfeiture provisions, whereas here the JO imposed both,

factors, we cannot say the district court erred in finding the penalties consistent with the Eighth Amendment.[14]

CONCLUSION

The Hornes are clearly dissatisfied and frustrated with a regulatory scheme they believe no longer serves the interests of the farmers it was designed, in large part, to protect. That being the case, the Hornes may wish to "take their case to the Secretary for a reevaluation of the [Raisin Marketing] Order and the regulations, for although the [Raisin

---

nothing in the statutory or regulatory language seems to preclude simultaneous imposition of remedial and punitive sanctions under the respective provisions. To the contrary, 7 C.F.R. § 989.166(c) expressly provides that compensation for failure to deliver reserve-tonnage raisins "shall be in addition to, and not exclusive of, any or all of the remedies or penalties prescribed in the act" for noncompliance with the act or regulation's requirements, and the Hornes do not challenge the legitimacy of this provision.

[14] We also reject the Hornes' contention that 7 U.S.C. § 608c(14)(B) exempts them from liability for their Raisin Marketing Order violations because in 2007 they filed an administrative petition pursuant to 7 U.S.C. § 608c(15)(A). See 7 U.S.C. § 608c(14)(B) (immunizing from civil penalty any handler who "in good faith and not for delay" files and prosecutes a qualifying administrative petition). First, this argument was already disposed of in one of our earlier decisions, *see Horne*, 397 Fed. Appx. at 486, and is not properly before us now. Moreover, even if the matter were properly before us, it is without merit. Section 608c(14)(B) only immunizes handlers from penalties otherwise incurred during the pendency of their administrative petition; it does not apply retroactively. Therefore, an administrative petition not filed until 2007 cannot immunize the Hornes from fines relating to their conduct in 2002-04.

Marketing] Order and the regulations are lawful, plaintiffs and other producers may prevail upon the Secretary to change them in order to better achieve the purpose behind the [AMAA]." *Prune Bargaining Ass'n v. Butz*, 444 F. Supp. 785, 793 (N.D. Cal. 1975), *aff'd sub nom. Prune Bargaining Ass'n v. Bergland*, 571 F.2d 1132 (9th Cir. 1978) (per curiam); *see* 7 U.S.C. § 608c(16) (prescribing mechanism for termination or suspension of marketing orders). Our role, however, is limited to reviewing the constitutionality and not the wisdom of the current regulation. Finding no constitutional infirmity in either the Raisin Marketing Order or the Secretary's application of it to the Hornes, the summary judgment of the district court is **AFFIRMED**.

APPENDIX D

United States District Court,
E.D. California.

Marvin D. HORNE and Laura R. Horne, d.b.a. Raisin Valley Farms and Raisin Valley Farms Marketing Association; Marvin D. Horne; Laura R. Horne; Don Durbahn; and the Estate of Rena Durbahn, d.b.a. Lassen Vineyards, Plaintiffs,
v.
UNITED STATE DEPARTMENT OF AGRICULTURE, Defendant.

No. CV–F–08–1549 LJO SMS. | Dec. 11, 2009.

Attorneys and Law Firms
Brian C. Leighton, Law Offices of Brian C. Leighton, Clovis, CA, for Plaintiffs.

Benjamin E. Hall, United States Attorney, Fresno, CA, for Defendant.

Opinion

ORDER ON CROSS MOTIONS FOR SUMMARY JUDGMENT (Docs.24, 26)

LAWRENCE J. O'NEILL, District Judge.

I. INTRODUCTION

Plaintiffs appeal an administrative decision of a defendant United States Department of Agriculture ("USDA") Judicial Officer ("JO") that imposed civil penalties and assessments for Plaintiffs' alleged violation of various provisions of the Agricultural Marketing Agreement Act of 1937, as amended, 7 U.S.C. § 601 et seq. ("AMAA") and the order regulating the Handling of Raisins Produced from Raisin Variety Grapes Grown in California, 7 C .F.R. Part 989 ("Marketing Order"). This appeal presents four issues on cross motions for summary judgment: First, this Court considers Plaintiffs' challenge to the JO's opinion that Plaintiffs are "handlers" who "acquired" raisins and were therefore subject to the Marketing Order. Second, the Court considers whether the penalties imposed by the JO violate the Excessive Fines Clause of the Eighth Amendment to the United States Constitution. Third, the Court is asked to decide whether the Marketing Order's reserve requirement violates the Due Process Clause of the Fifth Amendment to the United States Constitution as a physical taking of Plaintiffs' property without just compensation. Finally, this Court determines whether the JO's decision to dismiss Plaintiffs' administrative petition was arbitrary, capricious, an abuse of discretion, and contrary to the law. Having read and reviewed the parties' arguments, and considering the administrative record and the applicable case law, this Court GRANTS summary judgment in favor of defendant USDA and against Plaintiffs.

II. BACKGROUND

A. Legal Framework

"The AMAA was originally enacted during the Depression, with the objective of helping farmers obtain a fair value for their agricultural products." *Lion Raisins, Inc. v. U.S.*, 416 F.3d 1356, 1358 (Fed.Cir.2005) (*"Lion II"*), *citing Pescosolido v. Block*, 765 F.2d 827, 828 (9th Cir.1985); 7 U.S.C. § 602 (2000). The AMAA "contemplates a cooperative venture among the Secretary [of Agriculture], handlers, and producers the principal purposes of which are to raise the price of agricultural products and to establish an orderly system for marketing them." *Block v. Cmty. Nutrition Inst.*, 467 U.S. 340, 346, 104 S.Ct. 2450, 81 L.Ed.2d 270 (1984). To accomplish this, the AMAA delegates authority to the Secretary of Agriculture to issue marketing orders regulating the sale and delivery of various commodities, including raisins. The Marketing Order was created in an effort to limit the supply of raisins on the open market, and thus, to stabilize prices. *See* 7 U.S.C. §§ 608c (1), (2), (6)(C).

The Marketing Order does not regulate raisin producers (i.e., growers, farmers). Instead, "handlers" of California raisins are subject to the requirements of the Marketing Order, 7 C.F.R. § 981.1 et seq. Handlers who acquire raisins are required, inter alia, to: (1) obtain USDA inspections of raisins acquired or received from growers, 7 C.F.R. § 989.58(d); (2) file accurate reports with the USDA's Raisin Administrative Committee ("RAC"), 7 C.F.R. § 989.73; and (3) allow access to records to verify the accuracy of the reports filed with the RAC. 7 C.F.R. § 989.77. The USDA may obtain injunctive relief, civil

penalties, and criminal penalties against handlers who fail to comply with the regulatory provisions of the Marketing Order. 7 U.S.C. §§ 608a(5), 608a(6), 608c(14).

The Marketing Order creates the RAC, a raisin industry group responsible for the administration of the Marketing Order. The RAC is composed of forty-seven members who represent different groups in the raisin industry, including thirty-five producers, ten handlers, one cooperative bargaining association, and one member of the public. The RAC is an agent of the federal government. Members of the RAC are nominated by the industry groups and appointed by the Secretary of Agriculture. 7 C.F.R. §§ 989.26, .29, .30. The RAC receives no federal appropriations. To fund the RAC, handlers must pay an $8 per ton assessment for free tonnage raisins. 7 C.F.R. § 989.90. The assessments pay for approximately 50% of the administration costs of the RAC. 7 C.F.R. §§ 989.53, 989.79, 989.80(a), 989.82.

The Marketing Order is designed "to prevent over-production of agricultural products and excessive competition in marketing them, with price stabilization as the ultimate objective." *Parker v. Brown*, 317 U.S. 341, 368, 63 S.Ct. 307, 87 L.Ed. 315 (1943). To accomplish this goal, and as an additional way to fund the RAC, the Marketing Order contains a reserve requirement. The Marketing Order reserve requirement requires handlers to separate the raisins they receive or acquire from producers into "reserve tonnage" raisins for the benefit of the RAC and "free tonnage" raisins. Handlers may sell the free tonnage raisins on the open markets. The reserve tonnage is determined each year as a portion

of the raisins that handlers buy from producers. Handlers are required to transfer the reserve tonnage to the RAC. 7 C.F.R. § 989.66, 989.166. While raisin producers hold an equity interest in the reserve tonnage, the RAC may sell or dispose of the reserve raisins in secondary, non-competitive markets. The RAC uses some of the proceeds to fund its administration. The RAC pays to the producers any net proceeds remaining after it has disposed of the crop year's reserve raisins. It generally takes a few years for the RAC to dispose of a crop year's reserve tonnage raisins.

B. Plaintiffs' alleged activities

Marvin D. Horne ("Mr.Horne") has been a raisin farmer since 1969. Administrative Record ("AR") 1646. Mr. Horne and his wife, Laura R. Horne ("Ms.Horne") (collectively "the Hornes") produce raisins under the name of Raisin Valley Farms. *Id.* AR 1646, 1732. Raisin Valley Farms is a California general partnership, with the Hornes as partners. The Raisin Valley Farms name was registered in 1999.

Mr. Horne determined to sell his Raisin Valley Farms raisins without the use of a packer or handler, because he felt that the packers and the RAC "were stealing [his] crop." AR 1676. Mr. Horne consulted with many people, including attorneys, university professors, and officials, in an attempt to create a way to market his raisins without the use of the raisin packer system. Mr. Horne also exchanged several letters with the USDA in an effort to determine how he could market his raisins without becoming subject to the Marketing Order, as discussed in the relevant sections below. The focus of

this action relates to the Hornes' activities during the 2002–2003 and 2003–2004 crop years,[1] when the Hornes implemented their plan to market raisins outside of the bounds of the Marketing Order.

Mr. Horne, a former alternate member of the RAC, became a vocal opponent of the Marketing Order. AR 954. Mr. Horne wrote multiple letters to the Secretary of Agriculture and to the RAC to complain about the Marketing Order. AR 6343–44; AR 2423. On April 23, 2002, the Hornes sent a letter to the Secretary of Agriculture and to the RAC asserting that they were registering as a handler "under protest" because:

> we are growers that will pack and market our raisins. We reserve our rights under the Constitution of the United States ... [T]he Marketing Order Regulating Raisins has become a tool for grower bankruptcy, poverty, and involuntary servitude. The Marketing Order Regulating Raisins is a complete failure for growers, handlers, and the USDA ... [W]e will not relinquish ownership of our crop. We put forth the money and effort to grow it, not the Raisin Administrative Committee. This is America, not a communist state.

AR 2423. Thereafter, the USDA issued Plaintiffs handler number 94–101 in 2002.

---

[1] The crop year for raisins begins on August 1 and ends on July 31 of the following year.

In addition to growing raisins through Raisin Valley Farms, the Hornes entered into a partnership with Ms. Horne's parents, Don Durbahn ("Mr.Durbahn") and Rena Durbahn (collectively, "the Durbahns"), to create Lassen Vineyards. AR 1647–1850, 5550. Lassen Vineyards is a California general partnership between the Hornes and the Durbahns. Lassen Vineyards grows grapes and produces raisins. In addition to its grape growing activities, Lassen Vineyards purchased equipment to clean, stem, sort, and package raisins in 2001.

The Lassen Vineyards raisin packing equipment and facilities were located on land owned by Lassen Vineyards. Mr. Durbahn oversaw the Lassen Vineyard raisin packing plant. Mr. Horne's son, Marvin Horne, Jr. ("Marvin") was the plant manager. The equipment at the plant operated by Lassen Vineyards cleaned, stemmed, sorted, and packaged raisins throughout the 2002–2003 and 2003–2004 crop years. During this time, Lassen Vineyards packed Raisin Valley Farms and Lassen Vineyards raisins, and packed other farmer's raisins for a fee.

Raisins that were packed at Lassen Vineyards' plant were marketed and sold to wholesale customers by Raisin Valley Farms Marketing Association, an unincorporated association organized and operated by the Hornes ("Raisin Valley Marketing"), during crop years 2002–2003 and 2003–2004. AR 1652, 1996–97, 2117. Over 60 raisin growers joined Raisin Valley Marketing to gain volume selling power. Grower members of Raisin Valley Marketing sent their raisins to Lassen Vineyards' plant to be cleaned, stemmed, sorted, and

packaged. According to Plaintiffs, Raisin Valley Marketing sold raisins on behalf of its members, while the growers maintained ownership. According to Mr. Horne, Raisin Valley Marketing held grower sales funds in a trust account, paid Lassen Vineyards for the use of their equipment, paid a third party broker fee, and distributed the net proceeds to the growers.

Lassen Vineyards charged a fee to Raisin Valley Marketing members, typically twelve cents per pound, to pack California raisins at the plant. Lassen Vineyards charged these growers an additional five dollars per pallet for raisins that were boxed and stacked. AR 1940–41, 1957. The packing fee covered the cost of the labor and packaging materials. AR 1942–44. The workers who operated the equipment were "leased" to Lassen Vineyards by Ms. Horne and Ms. Durbahn. AR 1710. The Lassen Vineyards packing operation was supervised on a daily basis by Mr. Durbahn and Marvin, whose wages were paid by Lassen Vineyards. AR 1948–49.

Plaintiffs contend that during the 2002–2003 and 2003–2004 crop years: Lassen Vineyards was a "leasing company" that "rented" the equipment to other growers to clean, stem, and sort their own raisins and "leased" employees of the plant who operated the machinery; Mr. Durbahn did not process raisins as a handler, he oversaw the operation of a leased plant; Marvin managed the leased equipment; growers leasing the equipment from the Lassen Vineyards plant were assigned lot numbers to preserve the identity of their product; Lassen Vineyards never stored, purchased, controlled, acquired, or handled raisins; growers

using the facilities engaged in the cleaning, stemming, sorting, grading, and packing function through leased employees and equipment; and lessees maintained right, title, ownership, and control of the raisins until they were sold to the consumer market. Plaintiffs maintain that they were exempt from the Marketing Order during the 2002–2003 and 2003–2004 crop years, because they were raisin growers, never acquired raisins, and were working within the Farmers to Consumers Direct Marketing Act.

In his testimony, Mr. Horne admitted that both Lassen Vineyards and Raisin Valley Farms acted as "packers" under the Marketing Order during the 2002–2003 and 2003–2004 crop years. AR 1761–62. Mr. Horne admitted that Raisin Valley Farms did not pay assessments, did not have incoming inspections performed, did not hold raisins in reserve, and did not report acquisitions of raisins during the 2002–2003 and 2003–2004 crop years. AR 1743–45. When asked whether he held raisins in reserve, Mr. Horne replied, "No. They're my raisins." AR 1743. He admitted that his reports to the RAC disclosed "zero acquisitions." AR 1744.

Mr. Horne admitted that for crop years 2002–2003 and 2003–2004, Lassen Vineyards operated a packing house on land with equipment owned jointly by the Hornes and the Durbahns. AR 1685. Mr. Horne further admitted that Lassen Vineyards did not pay assessments, did not have incoming inspections performed, did not hold raisins in reserve, and did not report acquisitions of raisins during the 2002–2003 and 2003–2004 crop years, because "they're not acquired raisins." AR 1747–51.

The USDA performed outgoing inspections on the raisins packed at Lassen Vineyards. AR 1745, 1747–48. During the hearing, the USDA introduced evidence that Lassen Vineyards packed out more than 1.2 million pounds of raisins during the 2002–2003 crop year and more than 1.9 million pounds of raisins for the 2003–2004 crop year. AR 740–51, 2186–2304, AR 2602–5512.

C. Administrator's Proceedings against Plaintiffs

On April 1, 2004, AJ Yates, Administrator of the Agriculture of the Agriculture Marketing Service ("administrator") filed a complaint before the Secretary of Agriculture against the Hornes, d.b.a. Raisin Valley Farms (collectively referred to as "Raisin Valley Farms"). AR 1–5. The administrator's complaint alleged that Raisin Valley Farms was "engaged in the business as 'handler' of California raisins" during the 2002–2003 and 2003–2004 crop years. AR 1. The administrator alleged that Raisin Valley Farms violated the AMAA and the Marketing Order by submitting inaccurate forms to the RAC, failing to hold inspections of incoming raisins, failing to hold raisins in reserve, failing to pay assessments, and failing to allow access to records. The administrator filed an amended complaint on October 25, 2004.

Raisin Valley Farms denied the allegations. In addition, Raisin Valley Farms filed an amended answer on January 21, 2005 asserting various affirmative defenses, including that the AMAA and the Marketing Order are unconstitutional; Raisin Valley Farms is not a handler and did not acquire physical possession of raisins within the meaning of

the regulations; Raisin Valley Farms did not handle or acquire raisins of third-party producers that processed their raisins through equipment owned by Lassen Vineyards; and Raisin Valley Farms was not required to comply with the reporting, incoming inspection, and other requirements alleged in the amended complaint. AR 82–88.

A hearing on the administrator's action took place in front of the administrative law judge ("ALJ") between February 9–11, 2005. At the February 2005 hearing, Mr. Horne testified. After the hearing, and to conform the complaint to the evidence presented at the February 2005 hearing, the administrator moved to amend the complaint to include Raisin Valley Marketing and the Hornes and the Durbahns, doing business as Lassen Vineyards (collectively referred to as "Lassen Vineyards") as parties to the administrative proceedings.[2] The ALJ granted the administrator's opposed motion to amend, and the second amended complaint was filed on August 10, 2005. Thereafter, a second hearing took place on May 23, 2006.

On November 1, 2006, the ALJ issued a decision and order finding that the Hornes and the Durbahns, "acting together as partners doing business as Lassen Vineyards" acted as first handlers of raisins and were subject to the Marketing Order. The ALJ found that Lassen Vineyards violated the AMAA and

---

[2] Ms. Durbahn died after the initial administrative action was filed but before Lassen Vineyards was added as a party to the administrative complaint. It is unclear from the record whether the Estate of Rena Durbahn was added as a party to the administrative proceedings, although the Estate of Rena Durbahn is a plaintiff in this action.

the Marketing Order, and ordered Lassen Vineyards (the Hornes and Mr. Durbahn), to pay the following, jointly and severally: (1) $731,500 in civil penalties; (2) $9,389.73 in assessments; and (3) $523,037 as the dollar equivalent of the raisins that Lassen Vineyards failed to hold in reserve.

Plaintiffs appealed the ALJ's decision to the JO on January 4, 2007. In its April 11, 2007 Decision and Order ("Initial Decision"), the JO found that Raisin Valley Farms *and* Lassen Vineyards committed the following violations of the Marketing Order:

> 1. Twenty violations of 7 C.F.R. 989.73 for filing inaccurate reporting forms to the RAC;
>
> 2. Fifty-eight violations of 7 C.F.R. § 989.58(d) for failure to obtain incoming inspections;
>
> 3. Two violations of 7 C.F.R. § 989.66 for failure to hold reserve raisins for crop year 2002–2003 and 2003–2004;
>
> 4. Two violations of 7 C.F.R. § 989.80 for failure to pay assessments to the RAC; and
>
> 5. One violation of 7 C.F.R. § 989.77 for failure to allow the Agricultural Marketing Service to have access to the records.

AR 665–706. The administrator sought reconsideration of the JO's Initial Decision, challenging the JO's calculations of the civil penalties and assessments. In its Order Granting Petition to Reconsider, issued September 18, 2008 ("Reconsideration Order"), the JO imposed the following penalties against Lassen Vineyards and

Raisin Valley Farms, jointly and severally:

1. $202,600.00 as a civil penalty;

2. $8,783.39 in assessments for the 2002–2003 and 2003–2004 crop years; and

3. $483,843.53 for the alleged dollar equivalent of the California raisins Plaintiffs failed to hold in reserve for the 2002–2003 and 2003–2004 crop years.

AR 757–778.

D. Plaintiffs' Administrative Petition Against USDA

Plaintiffs filed an administrative petition on March 5, 2007 to challenge various Marketing Order regulations. Plaintiffs filed their administrative petition pursuant to 7 U.S.C. § 608c(15)(A), a procedure created by the AMAA that expressly provides *handlers* an administrative procedure to challenge the Marketing Order. *See United Dairyman of Ariz. v. Veneman*, 279 F.3d 1160, 1164 (9th Cir.2002). In moving to dismiss Plaintiffs' petition, the USDA argued, among other things, that since Plaintiffs did not admit that they were handlers during the time period in question, they had no jurisdiction to file an administrative petition as handlers. The ALJ denied the USDA's motion to dismiss, reasoning that because the USDA investigated Plaintiffs, determined Plaintiffs were handlers, and initiated proceedings against Plaintiffs to establish they were handlers, Plaintiffs had jurisdiction to file an administrative petition pursuant to 7 U.S.C. § 608c(15)(A). The

administrator appealed the ALJ's denial of its motion to dismiss. On February 4, 2008, the JO agreed with the administrator to rule that Plaintiffs lacked jurisdiction to file an administrative petition pursuant to 7 U.S.C. § 608c(15)(A).

On March 18, 2008, forty-three days after the JO's decision, Plaintiffs initiated an action in this Court to appeal the JO's decision. *Horne v. USDA*, CV–08–402 OWW SMS. The USDA moved to dismiss for lack of subject matter jurisdiction. On November 13, 2008, Judge Oliver W. Wanger granted the USDA's motion to dismiss, finding that Plaintiffs' appeal was untimely pursuant 7 U.S.C. § 608c(15)(B). Plaintiffs appealed Judge Wanger's decision to the Ninth Circuit Court of Appeals. That appeal remains pending.

E. Procedural History

On October 14, 2008, Plaintiffs[3] filed their complaint in this Court seeking declaration relief and review of the USDA's decision pursuant to 7 U.S.C. § 608c(14)(B). Plaintiffs moved for summary judgment on August 28, 2009. The USDA moved for summary judgment on October 6, 2009. Plaintiffs opposed the USDA's motion on November 3, 2009.

---

[3] Plaintiffs are the Hornes, d.b.a. Raisin Valley Farms; the Hornes' unincorporated association Raisin Valley Marketing; and the Hornes, Mr. Durbahn, and the Estate of Rena Durbahn, d.b.a. Lassen Vineyards. Although the JO's orders affect the Hornes, Mr. Durbahn, Lassen Vineyards, and Raisin Valley Farms, all plaintiffs collectively assert their arguments against the JO's orders. Accordingly, when referring to Plaintiffs' arguments, this Court's use of the term "Plaintiffs" refers to all of the named plaintiffs. When referring to "Plaintiffs" with regard to the JO's orders, the term "Plaintiffs" refers only to those plaintiffs affected by the JO's orders. To avoid confusion, this Court will use specific plaintiff names where practicable.

The USDA opposed Plaintiffs' motion on November 19, 2009. As no party requested oral argument, this Court vacated the December 4, 2009 hearing by minute order on November 30, 2009.

III. STANDARD OF REVIEW

Plaintiffs challenge the JO's Initial Decision and Reconsideration Order pursuant to the Administrative Procedures Act ("APA"), 5 U.S.C. § 706(2)(A). When reviewing an order under the APA, "[j]udicial review of an agency decision is narrow." *Balice v. USDA*, 203 F.3d 684, 689 (9th Cir.2000). This Court may not weigh the evidence and substitute its own findings for those of the agency. *Id.* According to the statute, this Court may set aside an agency decision only when it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). An agency does not act in an arbitrary and capricious manner when it presents a "rational connection between the facts found and the conclusions made." *Nat'l Wildlife Fed'n v. U.S. Army Corps of Eng'rs*, 384 F.3d 1163, 1170 (9th Cir.2004).

In an action for judicial review of an administrative decision, the burdens of persuasion and proof rest with the party challenging the ALJ's or JO's decision. *Clyde K. v. Puyallup Sch. Dist., No. 3*, 35 F.3d 1396, 1399 (9th Cir.1994), *superceded on other grounds by statute, as recognized in M.L. v. Federal Way Sch. Distr.*, 341 F.3d 1052 n. 7 (9th Cir.2003); *see also, Sorenson Communications, Inc. v. F.C.C.*, 567 F.3d 1215 (10th Cir.2009) (in APA challenge of agency decision, burden is on petitioner to establish the action is arbitrary and capricious);

Transportation Workers Union of America, AFL–CIO v. Transportation Sec. Admin., 492 F.3d 471 (D.C.Cir.2007) (on petition for review of order of administrative agency, petitioner bears the burden of production on appeal and must support each element of its claim to challenge order by affidavit or other evidence); *Save Our Heritage, Inc. v. F.A.A.*, 269 F.3d 49 (1st Cir.2001) (those who assail an agency's findings or reasoning have the burden to identify the defects in evidence and the faults in reasoning.).

The APA authorizes this Court to set aside factual findings only if they are "unsupported by substantial evidence." 5 U.S.C. § 706(2)(E); *Armstrong v. Comm'r of Soc. Sec. Admin.*, 160 F.3d 587, 589 (9th Cir.1998); *Balice*, 203 F.3d at 689. Substantial evidence "does not mean a large or considerable amount of evidence, but rather 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.' " *Pierce v. Underwood*, 487 U.S. 552, 565, 108 S.Ct. 2541, 101 L.Ed.2d 490 (1988) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229, 59 S.Ct. 206, 83 L.Ed. 126 (1938)). "Substantial evidence is more than a scintilla but less than a preponderance." *Tidwell v. Apfel*, 161 F.3d 599, 601 (9th Cir.1999). If the record supports more than one rational interpretation of the evidence, the Court will defer to the administrative officer's decision. *Bayliss v. Barnhart*, 427 F.3d 1211, 1214 n. 1 (9th Cir.2005). Thus, in its review of a JO decision, the Court will not substitute its judgment for that of the agency. *Marsh v. Oregon Natural Res. Council*, 490 U.S. 360, 378, 109 S.Ct. 1851, 104 L.Ed.2d 377 (1989).

IV. DISCUSSION

A. Whether Plaintiffs are "handlers" who "acquired" raisins and are therefore subject to the Raisin Order

The JO found that Lassen Vineyards and Raisin Valley Farms were handlers who acquired raisins and, therefore, were subject to the Marketing Order during the 2002–2003 and 2003–2004 crop years. The JO further found that Lassen Vineyards and Raisin Valley Farms violated numerous provisions of the AMAA and Marketing Order. The parties do not dispute that a handler that acquires raisins is required to obtain incoming inspections, hold the designated amount in reserve, file reports with the RAC, allow access to records to verify the accuracy of the reports, and pay assessments to the RAC. 7 C.F.R. §§ 989.58(d); 989.66; 989.166; 989.73; 989.77; and 989.90.

In this challenge to the JO's decision, Plaintiffs advance multiple theories that they were either not subject to the Marketing Order or qualified for an exemption. First, Plaintiffs claim that they were not subject to the Marketing Order because they were not handlers. Second, Plaintiffs contend that they were not subject to the Marketing Order because they did not acquire raisins. Third, Plaintiffs assert that prior USDA opinion letters to Plaintiffs support Plaintiffs' position that they would not be subject to the Marketing Order for their activities. Fourth, Plaintiffs argue that there is no evidence that any plaintiff was a handler. Fifth, Plaintiffs assert that the Marketing Order does not apply to lessors of packing equipment. Sixth, Plaintiffs argue that as raisin growers they were exempt from the Marketing

Order. Seventh, Plaintiffs argue that the Farmer to Consumer Direct Marketing Act creates an applicable exemption to the Marketing Order. The Court considers, and ultimately rejects, each of Plaintiffs' arguments below.

1. Plaintiffs were "handlers"

Plaintiffs contend that the JO erred to conclude that they were handlers, because the substantial evidence demonstrates that they are raisin growers, not raisin handlers. A "handler" is:

> (a) any processor or packer; (b) any person who places, ships, or continues natural conditioned raisins in the current of commerce from within the area to any point outside thereof; (c) any person who delivers off-grade raisins, other failing raisins or raisin residual material to other than a packer or other than into any eligible non-normal outlet; or (d) any person who blends raisins [subject to certain exceptions].

7 C.F.R. § 989.15. According to this definition, an entity is a handler if it is a packer. A "packer" is:

> any person who, within [California], stems, sorts, cleans, or seeds raisins, grades stemmed raisins, or packages raisins for market as raisins: *Provided, That:* (a) No producer with respect to the raisins produced by him, and no group of producers with respect to raisins produced by the producers comprising the group, and not otherwise a packer,

> shall be deemed a packer if he or it sorts or cleans (with or without water) such raisins in their unstemmed form;

7 C.F.R. § 989.14 (emphasis in original). Thus, if Plaintiffs engaged in stemming, sorting, cleaning, seeding, grading, or packaging of raisins within California, they were "handlers" pursuant to the Marketing Order. Plaintiffs may also be handlers if they "place natural conditioned raisins in the current of commerce." 7 C.F.R. 989. § 15.

The evidence establishes that Lassen Vineyards stemmed, sorted, cleaned and packaged raisins. Thus, pursuant to 7 C.F.R. § 989.14, Lassen Vineyards was a handler of raisins. Substantial evidence further establishes that Raisin Valley Farms contributed to the packing of raisins at the Lassen Vineyards plant, as discussed more fully below. Moreover, substantial evidence shows that Raisin Valley Farms placed raisins in the stream of interstate commerce. Accordingly, Raisin Valley Farms was a handler.

Plaintiffs argue, however, that as raisin producers, both Lassen Vineyards and Raisin Valley Farms are exempt from the definition of packer. Plaintiffs correctly point out that according to the definition, "[n]o producer with respect to the raisins produced by him ... shall be deemed a packer if he or it sorts or cleans ... such raisins in their unstemmed form." 7 C.F.R. § 989 .14. Plaintiffs fail to demonstrate, however, that Lassen Vineyards or Raisin Valley Farms sorted or cleaned their raisins in an *unstemmed* form. The substantial evidence introduced by the USDA at the administrative hearing supports the JO's conclusion that Lassen

Vineyards stemmed the raisins in addition to other packing activities. In addition, Plain concede that the definition of handler within Marketing Order "captured within its scope producer who seeds, grades, packages, or st raisins or places raisins into interstate comme Pl. Mem., 15 (referencing 7 C.F.R. §§ 989.14, 989 Accordingly, this exemption is inapplicable Plaintiffs. Because the substantial evid demonstrates that Plaintiffs engaged in stemm sorting, cleaning, seeding, grading, or packagin raisins within California, they were "hand pursuant, and subject, to the Marketing Order.

2. Plaintiffs "acquired" raisins

Plaintiffs contend that there is no evidence they "acquired" raisins. Plaintiffs argue that USDA "failed to produce any evidence of a si seller, or buyer, or evidence of consideration c title transfer. It failed to prove a sale of goods r required for a simple, ordinary case governed by Uniform Commercial Code, and it offered no pro any acquisition." Plaintiffs construe the t "acquire" to require a purchase and sale of good demonstrated by the transfer of title.

This Court agrees with the JO that Plain "arguments that they did not acquire raisins unavailing in light of the plain meaning of language of the Raisin Order defining the term." 773. The Marketing Order defines "acquire" in following way:

> "Acquire" means to have or obtain physical possession of raisins by a handler at his packing or processing

> plant or at any other established receiving station, operated by him: provided that a handler shall not be deemed to acquire raisins (including raisins produced or dehydrated by him) while: (a) he stores them for another person or as a handler-produced tonnage in compliance with the provisions of 989.58 & 989.70; (b) he reconditions them, or; (c) he has them in his possession for the purpose of inspection, and provided further, that the term shall apply only to the handler who first acquires the raisins.

7 C.F.R. § 989.17. This definition is not ambiguous. Plaintiffs "acquire" raisins if they "obtain physical possession of raisins ... at [the] packing or processing plant ... operated by [them]." The definition cannot be interpreted reasonably to required a sale of goods under the UCC, as Plaintiffs argue. The plain and unambiguous definition of "acquire" requires "physical possession" at a packing facility; it does not require the transfer of legal title.

Reasonable inferences made from substantial evidence support the JO's conclusion that Plaintiffs acquired raisins. The JO noted: "The record does not contain direct evidence that Mr. Horne and partners 'received' raisins but there is ample evidence that they 'packed-out' raisins (CX 82–CX 87). Logic allows me to conclude that raisins cannot be 'packed-out' unless they are received." AR 677, n. 4. Under the same sound logic, this Court finds that substantial evidence supports the JO's finding that Plaintiffs acquired raisins during the 2002–2003 and 2003–

2004 crop years. The uncontroverted evidence demonstrates that Plaintiffs stemmed, sorted, cleaned and packaged raisins at Lassen Vineyard's plant. During the hearing, the USDA introduced evidence that Plaintiffs, in their operation of Lassen Vineyards and using Raisin Valley Farms' handler number stamp, "packed out" more than 1.2 million pounds of raisins during the 2002–2003 crop year and more than 1.9 million pounds of raisins for the 2003–2004 crop year. This evidence supports the logical conclusion that Plaintiffs has physical possession of, and thus acquired, those raisins that they handled and packed out at Lassen Vineyards.

3. USDA Opinion Letters were Consistent with the JO's Decision

Plaintiffs contend that an April 23, 2001 letter from Robert Keeney of USDA–AMS Fruit and Vegetable Programs ("Keeney Letter") "should be dispositive of this case." The Keeney Letter reads:

> In your letter, you indicated that Raisin Valley Farms has entered into an agreement with Del Rey Packing Company (Del Rey) whereby Del Rey will "custom pack" all of Raisin Valley's organic raisin crop. Del Rey will perform "packer" functions on Raisin Valley Farms' raisins such as stemming, sorting, and seeding. Del Rey will also ensure that the raisins are inspected but will not take title to the raisins ...
>
> [I]n this situation you described, you are correct that Raisin Valley Farms would be neither a packer nor a handler under the order.

AR 6316–17. Plaintiffs interpret this letter to opine

that Raisin Valley Farms would not be a handler in the situation where Raisin Valley Farms uses a custom packer to pack its raisins, and would not be a handler under facts of ths action. Plaintiffs argue that the USDA "cannot have it both ways, and be situational about when it will, and will not, treat one of the Respondents as a 'handler' or 'packer.' "

The USDA points out that Plaintiffs "omit any mention of the critical part of the [Keeney] letter and misconstrue entirely its importance in this case." The Keeney Letter was a response to a March 15, 2001 letter that Plaintiffs wrote to the USDA in which Plaintiffs advised the USDA that "Raisin Valley Farms has entered into an arrangement whereby Del Rey Packing will 'custom pack' in 50 pound boxes the certified 100% organic raisin crop produced by Raisin Valley Farms." AR 6316–17. Plaintiffs further informed the USDA in their letter that:

> Raisin Valley Farms will not stem, sort, seed, or grade its organic raisin crop. That will be accomplished pursuant to the "custom packing" arrangement entered into between Raisin Valley Farms and Del Ray Packing ... Del Rey Packing will not take title, will not place any of Raisin Valley Farms' raisins in its inventory, and will not sell any portion of Raisin Valley Farms' organic raisin crop. It will merely "custom pack" on behalf of Raisin Valley Farms. As such, Raisin Valley Farms does not fall within the definition of a "packer" under ... the Raisin Marketing Order.

Id. Plaintiffs asked the USDA to "advise if your interpretation of ... the ... Marketing Order is inconsistent with the intent of the marketing program as interpreted by Raisin Valley Farms." *Id.* The Keeney Letter was written in response to Plaintiffs' March 2001 letter to address the hypothetical situation therein described. And while the Keeney Letter opines that Raisin Valley Farms would not be handler or packer under that hypothetical situation, Plaintiffs omit the following key passage:

> Rather, Del Rey would be a packer and handler. Del Rey would acquire Raisin Valley Farms' raisins, and would further be required to meet the order's obligations regarding volume regulation, quality control, payment of assessments to the Raisin Administrative Committee (RAC), and reporting requirements.

AR 6316–17.

From this letter exchange, three points emerge. First, the USDA made clear that it would consider a custom or toll packer to be a handler that would be required to fulfill the Marketing Order obligations. The evidence supports, and Plaintiffs do not deny, that Lassen Vineyards performed "packer" functions on Raisin Valley Farms' raisins, such as stemming, sorting, and seeding. Thus, the USDA's opinion in the Keeney Letter is consistent with the JO's opinion; to wit, an entity that custom packs raisins is a handler and has a duty to meet the obligations under the Marketing Order.

Second, the Keeney Letter informed Plaintiffs that transfer of title was irrelevant to whether the custom packer was considered to be a handler under the Marketing Order. In their letter, Plaintiffs proposed that Del Rey will not place any of Raisin Valley Farms' raisins in its inventory, will not sell any portion of Raisin Valley Farms' organic raisin crop, and will not take title. Plaintiffs proposed that Del Rey would merely "custom pack" on behalf of Raisin Valley Farms. Under this scenario, the Keeney Letter concluded that Del Rey would be a packer and handler subject to the provisions of the Marketing Order. Thus, Plaintiffs were on notice since 2001 that a packer acquires raisins even if there is no transfer of title.[4]

Third, Plaintiffs's reliance on this hypothetical scenario is inapposite, because it describes a situation that is incongruent with the evidence. Plaintiffs hypothesized a situation in which they would perform none of the handler or packer functions. Instead, Raisin Valley Farms would pay an unrelated third-party (Del Rey) to stem, sort, seed and grade the raisins. Under this scenario, the raisin producer would not be a handler. As set forth above, however, Raisin Valley Farms and Lassen Vineyards

---

[4] Although the term "acquire" is unambiguous, this Court would defer to the USDA's interpretation of the meaning of the term if it were. *Barnhart v. Walton*, 535 U.S. 212, 218, 122 S.Ct. 1265, 152 L.Ed.2d 330 (2002) ("Courts grant an agency's interpretation of its own regulations considerable legal leeway."); *Auer v. Robbins*, 519 U.S. 452, 461, 117 S.Ct. 905, 137 L.Ed.2d 79 (1997) (To the extent that a regulation is ambiguous, the agency's interpretation of its own regulation is "controlling unless plainly erroneous or inconsistent with the regulation."). Here, the USDA consistently interpreted the meaning of the term "acquire" to include the scenario proposed, and ultimately pursued, by Plaintiffs.

collectively packed raisins during the 2002–2003 and 2003–2004 crop years, and charged others for that packing service. To the extent that Raisin Valley Farms and Lassen Vineyards produced raisins, they were not subject to the Marketing Order. But, to the extent that Raisin Valley Farms and Lassen Vineyards custom packed raisins for themselves and others, they were subject to the Marketing Order as handlers. The latter activities are the subject of this action, and the latter subjects Plaintiffs to the Marketing Order. In sum, Plaintiffs are correct that the Keeney Letter "should be dispositive;" however, the disposition of Plaintiffs' claims based on an accurate reading of this letter exchange and the evidence favors the USDA.

4. Evidence Supports Liability of both Lassen Vineyards and Raisin Valley Farms

In opposition to the USDA's summary judgment motion, Plaintiffs assert that the "USDA failed ... to assert substantial specific facts as to each 'Respondent' (Plaintiffs herein) that would justify that that specific person or a specific entity was a 'handler' and a handler who 'acquired' raisins and thus subject to the substantial (in this case massive) penalties under the AMAA." The Court notes that the JO used the terms Raisin Valley Farms, Lassen Vineyards, Mr. Horne, and "Mr. Horne and partners" interchangeably in its Initial Decision. At different points of the opinion, the JO found that Raisin Valley, Lassen Vineyards, and "respondents" individually engaged in the handling of raisins and violated the Marketing Order. Ultimately, the JO imposed sanctions against both Raisin Valley Farms and Lassen Vineyards. In the Reconsideration Order,

the JO refers to the respondents through the term "Mr. Horne and partners" only. AR 757–778. The JO's findings and orders depart from the ALJ's order that imposed sanctions against Lassen Vineyards only. Plaintiffs contend that there was no evidence presented that any entity handled, packed or acquired raisins.

While this Court finds that the evidence supports the ALJ's conclusion that Lassen Vineyards was the handler of raisins and violated the Marketing Order, this Court will not disturb the JO's orders. For the following reasons, this Court finds that there is "such relevant evidence as a reasonable mind might accept as adequate to support" the JO's conclusion. *Pierce*, 487 U.S. at 565. Because the record supports more than one rational interpretation of the evidence, the Court will defer to the JO's decision, *Bayliss*, 427 F.3d at 1214 n. 1, and will not substitute its judgment for the JO's opinion. *Marsh*, 490 U.S. at 378.

First, this Court agrees with the JO to find "Mr. Horne's business structure confusing at best." AR 685. As the JO explained:

> There appear [sic] to be three main entities, Raisin Valley Farms, Lassen Vineyards, and Raisin Valley Farms Marketing Association. The main problem is that at various times Mr. Horne uses the name "Raisin Valley Farms" for each. Without Mr. Horne's personal knowledge, it is impossible to know which bank account in the name of Raisin Valley Farms is the account for

> which company. In fact, there was not a bank account in the name of Lassen Vineyards.

AR 685. The following findings of fact represent the interplay between the three entities:

> When Raisin Valley Marketing Association received an order for raisins, Mr. Horne contacted one of the Raisin Valley Marketing Association members inquiring if the member would accept the price offered. When Mr. Horne found a grower willing to accept the order, he told that grower to bring the raisins to Lassen Vineyards' packing plant to be stemmed, sorted, cleaned, graded, and packaged. The buyer picked up the packaged raisins and left a bill of lading. When the buyer paid for the raisins, Mr. Horne deposited the funds into an account. Originally, the funds were deposited into an account in the name of Mr. and Mrs. Horne. Mr. Horne changed the account to one named "Raisin Valley Farms Marketing, LLT." Now, Raisin Valley Marketing Association has a "bone fide Association bank account" from which Mr. Horne, for Raisin Valley Farms Marketing Association, disburses funds to Lassen Vineyards, the brokers, and the growers.

AR 674–75. Moreover, the JO found that the confusion of the parties was caused, in significant part, by Mr. Horne's untimely and incomplete

production of records. AR 684–85. The JO found that evidence established that the Plaintiffs "play[ed] a kind of shell game with interlocking partnerships and a marketing association to try to conceal their role as first handler." AR 775. Based on Mr. Horne's testimony, in which he interchanged the entities, intermingling of funds, absence of separate bank accounts, and intermingling of duties between the entities, this Court finds that substantial evidence supports the JO's decision against both Raisin Valley Farms and Lassen Vineyards.

Second, substantial evidence supports the JO's finding that Raisin Valley Farms took direct part in the handling and packing of raisins. The Hornes, under the name of Raisin Valley Farms, filed RAC–5 forms during the 2001–2002, 2002–2003, and 2003–2004 crop years, "notifying the RAC of their intention to handle raisins as a packer under the Raisin Order." AR 670. "All of the raisins packed by Lassen Vineyards in crop years 2002–2003 and 2003–2004 were packaged in boxes stamped with the handler number 94–101. That number had been assigned to Marvin D. Horne and Laura R. Horne" doing business as Raisin Valley Farms. AR 671. Because all of the raisins packed out of Lassen Vineyards were stamped with Raisin Valley Farms' handler number, it was not unreasonable to conclude that Raisin Valley Farms handled and acquired raisins.

5. Plaintiffs' were subject to the Marketing Order notwithstanding their "Lease" Arrangement

Plaintiffs contend that the Marketing Order regulates "[o]nly genuine handlers," and "does not

reach equipment lessors." Plaintiffs describe the evidence as follows:

> Yes, there was evidence that Lassen Vineyards leased employees for the purpose of packing raisins and that it also leased equipment to farmers, including the Hornes and Durbahn [sic] so they can pack their own raisins but the Durbahns and Hornes were simply producers, not handlers, and Lassen Vineyards, acting as a lessor of labor and equipment and without putting raisins in the stream of interstate commerce or selling said raisins do not make them handlers, not packers, nor processors, nor is evidence of "acquiring" raisins.

Pl. Reply, 4:5–10. The Court finds that the JO correctly rejected Plaintiffs' arguments.

In his testimony, Mr. Horne testified that for a fee, his "family" packing operation "furnished equipment and employees to run the equipment." AR 1669. Lassen Vineyards owned the land, structures, and equipment of the packing plant. AR 1938–40. Lassen Vineyards did not have a separate bank account from the Hornes, Raisin Valley Marketing, or Raisin Valley Farms. AR 2034.

Substantial evidence adduced at the hearings demonstrate that Plaintiffs performed the functions of a handler. According to Mr. Horne's testimony, raisin producers paid Lassen Vineyards through Raisin Valley Marketing and Raisin Valley Farms to send their raisins "through the line; the cap stems

are removed; the raisins are washed; they're vacuumed; substandard is removed; sticks, stems, rocks, and any ... foreign material." AR 1668. The raisins at Lassen Vineyards then go:

> through an observation line where employees remove something that may not have been vacuumed out or a berry or raisin that may have mold on it. And from there, it goes into a scale where it's weighed and put into a box with liner—a food grade plastic liner. And the box is then put through taping machine, where it is sealed. And then it goes through another metal detector with a marking device that puts on the side of the box the date, the time packed, the packer number assigned to me, and the lot number of the grower or the customer.

AR 1669–70. Mr. Horne testified that his operation charged raisin producers a fee for the "use of the facility, the labor, the fiber, the plastic [used to package the raisins]." AR 1943. While Mr. Horne may characterize this arrangement as a lease, the evidence demonstrates that Plaintiffs were paid a fee to handle raisins that they had physical possession of in their packing plant, thus subjecting them to the Marketing Order.

Mr. Horne's testimony also revealed that the employees who operated Lassen Vineyards' equipment were employees of Plaintiffs, despite Mr. Horne's efforts to obscure this fact by creating another "leasing" agreement. It is undisputed that Mr. Durbahn supervised and Marvin managed the

Lassen Vineyards plant. Plaintiffs assert that the raisin producers packed their own raisins or leased employees who were not associated with the partnership. However, there is no evidence that anyone other than employees of Lassen Vineyards worked at the plant. Moreover, the "leasing employer[s]" of the employees were Ms. Horne and Ms. Durbahn, and most of the employees worked on Lassen Vineyards land.

Legally and factually, Plaintiffs were handlers subject to the Marketing Order despite the "leasing" agreements. No language in the AMAA or Marketing Order provides an exemption for an entity that performs the functions of a handler under a leasing agreement. Plaintiffs fail to support their argument that lessors of labor and equipment are exempt from the Marketing Order. The substantial evidence establishes that Plaintiffs were handlers, notwithstanding the various entities and lease agreement arrangements. The evidence supports the JO's conclusion that Plaintiffs were playing "a kind of shell game with interlocking partnerships and a marketing association to try to conceal their role as first handler." AR 775. The evidence further supports the JO's conclusion that "Marvin Horne and partners put in place a scheme to enhance their profitability by avoiding the requirements of the Raisin Order. By so doing, they obtained an unfair competitive advantage over everyone else in the raisin industry who complied with the Raisin Order." AR 694.

6. Raisin producers are exempt from the Marketing Order in their capacity as producers, not in their capacity as handlers

Plaintiffs contend that as producers, they are exempt from the Marketing Order. As set forth above, the AMAA and the Marketing Order impose obligations on handlers, not producers. The AMAA specifically excludes producers from regulation pursuant to the Marketing Order. 7 U.S.C. § 608c(13)(B). More specifically, the AMAA provides that a marketing order does not apply to "any producer *in his capacity as producer.*" 7 U.S.C. § 608c(13)(B) (emphasis added).

The exemption of 7 U.S.C. § 608c(13)(B) applies to Raisin Valley Farms and Lassen Vineyards in their capacities as raisin producers, but does not provide an exemption from the Marketing Order in their capacities as handlers. "The language 'in his capacity as * * * ' limits the exemption [.]" *Acme Breweries v. Brannan,* 109 F.Supp. 116, 188 (N.D.Cal.1952) (holding that hops producer was exempt from regulation as a producer under § 8c(13)(B) of the Act, but that it could be regulated as a handler since it did something to the hops other than grow them). Based on the express and explicit limiting clause, Plaintiffs are only exempt from the Marketing Order in their capacity as producers of raisins. *See Ideal Farms, Inc. v. Benson,* 288 F.2d 608, 614 (3d Cir.1961), *cert. denied,* 372 U.S. 965, 83 S.Ct. 1087, 10 L.Ed.2d 128 (1963) ("Other provisions of this section of the Act explicitly recognize that a person or business entity may be engaged in the milk business in more than one capacity and that a

producer is exempt from regulation only in his capacity as a producer.") (citing 7 U.S.C. § 608c(13)(B)); *see also, United States v. United Dairy Farms Co-op. Ass'n*, 611 F.2d 488, 491 n. 7 (3rd Cir.1979) ("producers who also function as handlers ... are subject to regulation under the milk marketing order); *Freeman v. Vance*, 319 F.2d 841, 842 (5th Cir.1963) (same). As the administrator's action against Plaintiffs focuses on Plaintiffs' activities as handlers, the 7 U.S.C. § 608c(13)(B) exemption is inapplicable. *See Lion*, 416 F.3d at 1360 ("Although producers are not directly bound by the statute, 7 U.S.C. § 608c(13)(B), under the specific terms of the Raisin Marketing Order, all persons seeking to market California raisins out-of-state are deemed handlers and must comply with the Order.")

In opposition, Plaintiffs repeat the assertion that "noone at USDA advised the Plaintiffs that [their proposed activities] would violate the Marketing Order." To the contrary, the USDA advised Plaintiffs on *multiple* occasions that a raisin producer who performs handling functions upon his or her own crop is subject to the Marketing Order. Additionally, the administrator and the RAC advised Plaintiffs that their proposed activities would fall within the Marketing Order regulations. Accordingly, Plaintiffs' assertion is insincere at best.

In addition to the Keeney Letter above, the USDA sent Plaintiffs advisory letters to interpret the Marketing Order regulations as they relate to Plaintiffs' proposed activities. In a January 18, 2002 letter, Maureen T. Pello, Senior Marketing Specialist in the Fresno, California Field Office of the AMS informed Mr. Horne that his proposed activities

would make him a handler under the Marketing Order:

> As we discussed, based upon your description of your proposed activities, you would be considered a handler under the Federal Marketing Order for California raisins ... As a handler, you would be required to meet all of the order's regulations regarding volume control, quality control (which includes incoming and outgoing inspections), assessments, and reporting to the Raisin Administrative Committee.

AR 6329. On May 20, 2002, the administrator (AJ Yates) responded to an inquiry from the Hornes with the following message:

> You indicate in your correspondence that you plan to pack and market your own raisins. Such activities would make you a handler under the order. As a handler, you would be required to meet all of the order's regulations ... Those who pack raisins are handlers under the order.

AR 6330–31. A year later, the administrator reiterated this point in response to another letter from the Hornes. The administrator wrote: "You state that 'handler producer' raisins are not acquired and therefore are not subject to the order's reserve requirements. This is not accurate. Handlers who produce and handle raisin production are subject to marketing order requirements, including reserve

requirements." AR 6373–74.

The RAC also advised Mr. Horne that he is not exempt from the Marketing Order as a producer if he handles raisins. On January 21, 2002, the RAC's Director of Compliance advised Mr. Horne in a letter that a handler is not exempt from the Marketing Order even if he or she is a producer. AR 2444–45. Notably, the Director of Compliance explained: "More than half of the recognized handlers on the RAC Raisin Packer list are also producers of raisins," and that those handler-producers comply with the Marketing Order's requirements. *Id.*

7. Farmer to Consumer Direct Marketing Act is inapplicable

Plaintiffs contend that they were exempt from the Marketing Order because their activities were in compliance with the Farmer to Consumer Direct Marketing Act, 7 U.S.C. § 3001 et seq. ("Farmer to Consumer Act"), passed by Congress forty years after the AMAA. Plaintiffs assert that the Farmer to Consumer Act is a "national policy that encouraged producers' circumvention of packers and middlemen." The Farmer to Consumer Act's statement of purpose declares:

> It is the purpose of this chapter to promote, through appropriate means, and on an economically sustainable basis, the development and expansion of direct marketing of agricultural commodities from farmers to consumers. To accomplish this objective, the Secretary of Agriculture (hereinafter referred to as the "Secretary") shall

> initiate and coordinate a program designed to facilitate direct marketing from farmers to consumers for the mutual benefit of consumers and farmers.

7 U.S.C. § 3001. Plaintiffs argue that the JO erred to impose assessments and penalties of nearly $700,000 "for selling raisins directly to the consumer, avoiding the 'middle man' as Congress directed the Secretary to implement in 1976 through 7 U.S.C. § 3001."

The USDA contends that the JO correctly rejected Plaintiffs' argument that the Farmer to Consumer Act creates an exemption to the Marketing Order. The USDA argues that Plaintiffs may not rely on the Farmer to Consumer Act for two reasons. First, the USDA maintains that nothing in the language of the Farmer to Consumer Act creates an exemption to the Marketing Order. Second, the USDA asserts that Plaintiffs offered no evidence that their activities were within the meaning of the Farmer to Consumer Act. As discussed below, both of the USDA's arguments are meritorious.

Both the ALJ and the JO found Plaintiffs' argument related to the Farmer to Consumer Act "patently specious." AR 772. This Court agrees. The ALJ and JO concluded that the Farmer to Consumer Act does not exempt raisin producers from the requirements of the Marketing Order. In this appeal, Plaintiffs have failed to articulate why this conclusion is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). The USDA points out that nothing in the language of the Farmer to Consumer Act creates an exception to the Marketing Order.

Plaintiffs repeat their position that they are exempt from the Marketing Order pursuant to the Farmer to Consumer Act, but cite no authority to support their position. Without authority or argument to support their position, Plaintiffs fail to carry their burden to identify the fault in the JO's reasoning and conclusion. *See, Save Our Heritage, Inc.*, 269 F.3d 49. Accordingly, the JO's decision that the Farmer to Consumer Act does not exempt Plaintiffs from the requirements of the Marketing Order is not clearly erroneous.

Moreover, even if the Farmer to Consumer Act did create an exemption to the Marketing Order for raisin producers, Plaintiffs failed to establish that their activities fell within the Farmer to Consumer Act or its goals. The Farmer to Consumer Act defines "direct marketing" from farms to consumers as:

> the marketing of agricultural commodities at any marketplace (including, but not limited to, roadside stands, city markets, and vehicles used for house-to-house marketing of agricultural commodities) established and maintained for the purpose of enabling farmers to sell (either individually or through a farmers' organization directly representing the farmers who produced the commodities being sold) their agricultural commodities directly to individual consumers, or organizations representing consumers, in a manner calculated to lower the cost and increase the quality of food to such consumers

> while providing increased financial returns to the farmers.

7 U.S.C. § 3002. Pursuant to this statutory definition, Plaintiffs would need to sell their raisins "directly to individual consumers" in marketplaces such as "roadside stands, city markets," farmer's markets, and the like to fall within the Farmer to Consumer Act. *Id.* Plaintiffs introduced no evidence to support their repeated claim that the raisins packed at Lassen Vineyards were sold directly to consumers. To the contrary, the evidence submitted led the JO's reasonable conclusion that: "Mr. Horne and partners sold raisins in wholesale packaging and quantities, frequently to candy makers and other food processors as ingredients for other food products. Mr. Horne and partners showed no connection between their business activities and the goals of the Farmer–to–Consumer Direct Marketing Act." AR 772. As the USDA points out, the evidence introduced during the administrative hearing established that Plaintiffs' raisins were packaged in large cases (AR 1740–41) and sold in large quantities-often tens of thousands of pounds-to commercial food companies. E.g., AR 2458 (invoice from Raisin Valley Farms to New York candy company for 1,160 twenty-five-pound cases of raisins); AR 2724 (invoice to Canadian food company for 1,190 thirty-pound cases of raisins); AR 2732 (invoice to Pennsylvania nut products company for 1,400 thirty-pound cases of raisins); AR 2863 (invoice to baking company for 700 thirty-pound cases of raisins). Plaintiffs offer no evidence to refute these invoices and offer no evidence that Plaintiffs sold raisins directly to consumers. Accordingly, the

substantial evidence of the administrative recor supports the JO's conclusion that the Farmer t Consumer Act was inapplicable to Plaintiffs an their activities during the 2002–2003 and 2003–200 crop years.

B. Whether the penalties imposed violate the Excessive Fines Clause of the Eighth Amendment

Plaintiffs contend that the assessments an penalties imposed by the JO violate the Excessiv Fines Clause of the Eighth Amendment to th United States Constitution. Plaintiffs argue that th imposition of "almost $700,000—for selling raisin directly to the consumer, avoiding the 'middle mar as Congress directed," is an excessive fine becaus (1) the USDA cannot demonstrate "harm" fro Plaintiffs' activities; (2) Plaintiffs' actions were i compliance with the Farmer to Consumer Act; an (3) Plaintiffs "used every available means t determine in advance whether or not wha anticipated and proposed doing was an alleg violation of the Marketing Order."

The Eighth Amendment provides: "Excessive bai shall not be required, nor excessive fines imposed nor cruel and unusual punishments inflicted." U.S Const., Amdt. 8. The word "fine" within thi amendment has been interpreted to mean "a payment to a sovereign as punishment for som offense." *United States v. Bajakajian*, 524 U.S. 321 328, 118 S.Ct. 2028, 141 L.Ed.2d 314 (1998) (quotin *Browning–Ferris Industries of Vt., Inc. v. Kelc Disposal, Inc.*, 492 U.S. 257, 265, 109 S.Ct. 2909, 10 L.Ed.2d 219 (1989)). The Excessive Fines Claus thus "limits the government's power to extrac

payments, whether in cash or in kind, as punishment for some offense." *Austin v. United States*, 509 U.S. 602, 609–610, 113 S.Ct. 2801, 125 L.Ed.2d 488, (1993) (emphasis deleted); *see also, Enquist v. Oregon Dep't of Agric.*, 478 F.3d 985, 1007 (9th Cir.2007) (Excessive Fines Clause applies to a government action that constitutes a punishment for an offense). Pursuant to *Bajakajian, supra*, a fine is unconstitutionally excessive if it is "grossly disproportional to the gravity of the defendant's offense." 524 U.S. at 334–35. "Excessive fines challenges involve a two-step inquiry: (1) whether the Excessive Fines Clause applies, and (2) if so, whether the fine is 'excessive." ' *Enquist*, 478 F.3d at 1006 (citing *Bajakajian*, 524 U.S. at 334).

The JO imposed three distinct remedies against Plaintiffs: (1) an order to pay the RAC $483,843.53 pursuant to 7 C.F.R. § 989.166(c); (2) an order to pay the RAC $8,783.39 in assessments pursuant to 7 C .F.R. § 989.80(a); and (3) civil penalties in total of $202,600 pursuant to 7 U.S.C. § 608c(14)(B). Plaintiffs' Eighth Amendment arguments are the same for each of the three penalties and assessments, and Plaintiffs assert that the entire sum is unconstitutional. Nevertheless, this Court considers Plaintiffs' challenge as it applies to each remedy under each regulation to determine whether the Excessive Fines Clause applies and, if so, whether the fine was excessive.

When reviewing the JO's choice of sanctions, this Court is limited to determining "whether, under the pertinent statute and relevant facts, the Secretary made an allowable judgment in choice of remedy." *Balice*, 203 F.3d at 689 (citing *Farley & Calfee, Inc. v.*

U.S. Dep't of Agric., 941 F.2d 964, 967 (9th Cir.1991)). This Court will not overturn a penalty unless it is either "unwarranted in law or unjustified in fact." *Bosma v. U.S. Dep't of Agric.*, 754 F.2d 804, 810 (9th Cir.1984) (citing *Butz v. Glover Livestock Comm'n Co.*, 411 U.S. 182, 185–88, 93 S.Ct. 1455, 36 L.Ed.2d 142 (1973)).

1. Reserve requirement compensation

The JO ordered Plaintiffs to pay $483,843.53 to the RAC, pursuant to 7 C.F.R. § 989.166(c), which reads:

> **Remedy in the event of failure to deliver reserve tonnage raisins.** A handler who fails to deliver to the Committee, upon request, any reserve tonnage raisins in the quantity and quality for which he has become obligated ... shall compensate the Committee for the amount of the loss resulting from his failure to so deliver ... The amount of compensation for any shortage of tonnage shall be determined by multiplying the quantity of reserve raisins not delivered by the latest weighted average price per ton received by producers during the particular crop year for free tonnage raisins of the same varietal type or types[.]"

Id. Pursuant to this regulation, the JO multiplied the quantity of the reserve raisins Plaintiffs failed to deliver for crop years 2002–2003 and 2003–2004 by the applicable average prices per ton to arrive at the total penalty. Plaintiffs do not challenge the JO's calculation of the fine. Rather, Plaintiffs argue that the penalty violates the Excessive Fines Clause because the USDA failed to demonstrate a harm in the amount of $483,843.53.

The USDA argues successfully that the Excessive Fines Clause is inapplicable to the penalty imposed based on 7 C.F.R. § 989.166(c), because the regulation is compensatory, not punitive. The plain language of the statute makes clear that this provision requires a handler who fails to deliver reserve raisins to "*compensate* the Committee *for the amount of the loss* resulting from his failure to deliver." 7 C.F.R. § 989.166(c) (emphasis added). Compensating the government for a loss serves a remedial purpose, but is not punitive. *Bajakajian*, 524 U.S. at 328 (citing Black's Law Dictionary 1293 (6th ed. 1990) ("[R]emedial action" is one "brought to obtain compensation or indemnity")). By its terms, the penalty pursuant to 7 C.F.R. § 989.166(c) compensates the RAC for lost revenues and recovers the value that Plaintiffs failed to deliver into the reserve pool. Thus, the penalty imposed, which allows the USDA to recover from Plaintiffs the dollar equivalent of the California raisins that Plaintiffs failed to hold in reserve for crop years 2002–2003 and 2003–2004, is remedial rather than punitive. *See, One Lot Emerald Cut Stones v. United States*, 409 U.S. 232, 237, 93 S.Ct. 489, 34 L.Ed.2d 438 (1972) (monetary penalty provides "a reasonable form of liquidated damages" to the Government and is thus a "remedial" sanction because it compensates Government for lost revenues). Because 7 C.F.R. § 989.166(c) is a remedial provision, the JO's order based on that regulation does not impose a "fine" subject to the Excessive Fines Clause.[5]

---

[5] Even if the Excessive Fines Clause applies to the challenged regulation, the fine imposed by the JO does not violate the Eighth

2. Assessment payment

The JO ordered Plaintiffs to pay $8,783.39 in assessments for the 2002–2003 and 2003–2004 crop years, pursuant to 7 C.F.R. § 989.80(a), which reads:

> Each handler shall, with respect to free tonnage acquired by him ... pay to the [RAC], upon demand, his pro rata share of the expenses ... which the Secretary finds will be incurred, as aforesaid, by the [RAC] during each crop year ... Such handler's pro rata share of such expenses shall be equal to the ratio between the total free tonnage acquired by such handler ... during the applicable crop year and the total free tonnage acquired by all handlers during the same crop year.

The JO multiplied the established assessment rate of $8 per ton by the established free tonnages to determine the total assessments due for the 2002–2003 and 2003–2004 crop years. Plaintiffs do not challenge the JO's calculation of the assessments.

Similar to the challenge above, Plaintiffs argue that the JO's order to pay $8,783.39 was an excessive fine because the USDA failed to demonstrate harm. Plaintiffs argue that they were not handlers, were not subject to the Marketing Order, and the JO's order is a "post hoc vendetta against Plaintiffs" by the USDA to punish Plaintiffs for activities that comply with the Farmer to Consumer Act.

Amendment because the fine is not "excessive," as explained more fully *infra*.

The USDA contends that the remedy under 7 C.F.R. § 989.80(a), like 7 C.F.R. § 989.166(c) discussed above, is compensatory. The USDA argues that the JO's order to pay $8,783.39 in assessments was designed to compensate the RAC for Plaintiffs failure to pay the assessments, as required by the Marketing Order. The USDA concludes that 7 C.F.R. § 989.80(a) is not subject to the Excessive Fines Clause.

The provision that requires handlers to pay assessment to the RAC, 7 C.F.R. § 989.80(a), is not punitive in nature; the assessments are levied to fund the RAC and its operations. *See Evans v. United States*, 74 Fed. Cl. 554, 557 (2006), *aff'd by Evans v. United States*, 250 Fed. Appx. 321 (Fed.Cir.2007). As set forth above, the RAC receives no federal appropriations. The RAC is funded by the assessments levied on handlers pursuant to 7 C.F.R. § 989.80(a) and from the proceeds of sales of the reserve raisins withheld from the open market. *Evans*, 74 Fed. Cl. at 557 (citing 7 C.F.R. §§ 989.53, 989.79, 989.80(a), 989.82). Under this regulation, the Marketing Order requires all raisin handlers to pay assessments to the RAC to fund the RAC and its operations. The obligation to pay is automatic and is triggered by a handler's acquisition or receipt of raisins; it requires no culpability. *C.f., Bajakajian*, 524 U.S. at 328 (forfeiture of currency is punishment because it is a an "additional sanction ... imposed at the culmination of a criminal proceeding and requires conviction of an underlying felony"). Thus, assessments are not imposed on handlers as a punishment for an action. Because 7 C.F.R. § 989.80(a) a funding regulation that is not punitive in nature, the JO's order based on that regulation does

not impose a "fine" subject to the Excessive Fines Clause.

3. Civil Penalties

In addition to the compensatory assessments and penalties above, the JO imposed civil penalties totaling $202,600 against Plaintiffs pursuant to 7 U.S.C. § 608c(14)(B), which reads:

> Any handler subject to an order issued under this section ... who violates any provision of such order may be assessed a civil penalty by the Secretary not exceeding $1,000 for each such violation. Each day during which such violation shall be deemed a separate violation ... The Secretary may issue an order assessing a civil penalty under this paragraph only after notice and an opportunity for an agency hearing on the record. Such order shall be treated as a final order reviewable in the district courts of the United States in any district in which the handler subject to the order is an inhabitant, or has the handler's principle place of business. The validity of such order may not reviewed in an action to collect such civil penalty.

Neither party disputes that this provision is punitive in nature, designed to punish a handler who violates any provision of the Marketing Order. Thus, the civil penalty is a "fine" within the meaning of the Excessive Fines Clause.

Because the JO imposed a "fine" pursuant 7 U.S.C. § 608c(14) (B), this Court must determine whether the fine imposed was excessive. A fine is unconstitutionally excessive if it is "grossly disproportional to the gravity of the defendant's offense." *Bajakajian*, 524 U.S. at 334–35. "Whether a penalty is grossly disproportionate calls for the application of a constitutional standard to the facts of a particular case, and in that context, de novo review is appropriate." *Balice*, 203 F.3d at 698.

The JO found that Plaintiffs committed the following violations:

- Twenty violations of section 989.73 of the Raisin Order (7 C .F.R. § 989.73) by filing inaccurate forms with the RAC on 20 occasions.

- Fifty-eight violations of section 989.58(d) of the Raisin Order (7 C.F.R. § 989.58(d)) by failing to obtain incoming inspections of raisins on 58 occasions.

- Two violations of 989.80 of the Raisin Order (7 C.F.R. § 989 .80) by failing to pay assessments to the RAC in crop year 2002–2003 and crop year 2003 and 2004.

- Five hundred ninety-two violations of sections 989.66 and 989.166 of the Raisin Order (7 C.F.R. §§ 989.66, .166) by failing to hold raisins in reserve and by failing to pay the RAC the dollar equivalent of the raisins not held in reserve.

- One violation of section 989.77 of the Raisin Order (7 C.F.R. § 989.77) for failing to allow access to Plaintiffs' records.

To deter Plaintiffs from continuing to violate the Marketing Order, and to deter others from similar future violations, the JO concluded that the following civil penalties for these violations were "appropriate" and "sufficient": (1) $300 per violation for filing inaccurate reporting forms; (2) $300 per violation for the failure to obtain incoming inspections; (3) $300 per violation for failing to pay the assessments; (4) $300 per violation for failure to hold raisins in reserve; and (5) $1000 for the failure to allow access to records.

When determining whether fines are excessive, the Court first considers that "judgements about appropriate punishment for an offense belong in the first instance to the legislature." *Balice*, 203 F.3d at 699 (quoting *Bajakajian*, 524 U.S. at 336) (citing *Solem v. Helm*, 463 U.S. 277, 290, 103 S.Ct. 3001, 77 L.Ed.2d 637 (1983)). The USDA points out that the civil penalties imposed by the JO fall well below the level authorized by Congress. As set forth above, Congress authorized civil penalties up to $1,000 for each violation. In addition, Congress mandated that "[e]ach day during which such violation continues shall be deemed a separate violation." 7 U.S.C. § 608c(14)(B). The JO found 673 separate violations, spanning over a two year period of time. Thus, the JO was authorized by statute to impose a civil penalty of no less than $673,000. The potential civil penalty calculation would be substantially larger if the JO imposed the maximum penalty of $1,100, pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, and/or considered that each

violation occurred over multiple days.[6] Considering the fine in total, $202,600 is not an excessive fine to punish 673 separate violations of the Marketing Order, when the JO could have imposed a fine of $673,000 or more. The JO imposed a $300 fine for 672 violations, less than one-third of the amount authorized by statute. *C.f.*, *Balice*, 203 F.3d 684 (finding that statutory maximum of $2,000 penalty for AMAA violation of almond marketing order was not an excessive fine for handler's failure to report, keep accurate records, and hold almonds in reserve). Accordingly, the Court finds that the $202,600 in civil penalties assessed on Plaintiffs by the JO pursuant to 7 U.S.C. § 608c(14)(B) is not "grossly disproportional to the gravity of the [plaintiffs'] offense[s]." *Bajakajian*, 524 U.S. at 334–35.

Plaintiffs contend that the fines are excessive because: (1) the USDA cannot demonstrate "harm" to anyone caused by Plaintiffs' activities; (2) Plaintiffs' actions complied with the Farmers to Consumers Direct Marketing Act; (3) Plaintiffs were not handlers and, therefore, not subject to the Marketing Act. Plaintiffs' second and third arguments have been discussed *infra*, and are unpersuasive and inapposite to this analysis. As to Plaintiffs' argument that would require the USDA to demonstrate harm, the Ninth Circuit rejected this argument in a case similar to the one at bar.

---

[6] As the JO noted, the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended, 28 U.S.C. § 2461 note, adjusted the civil monetary penalty that may be assessed under the AMAA. For each violation of a marketing order, the maximum civil penalty is $1,100. 7 C.F.R. § 3.91(b)(1)(vii).

In *Balice*, almond handlers challenged penalties imposed under 7 U.S.C. § 608c(14) as constitutionally excessive because the violations resulted in "no harm to the Government and no harm to the industry." 203 F.3d at 699. The *Balice* almond handlers committed offenses similar to those committed by Plaintiffs, and the USDA imposed fines on them pursuant to 7 U.S.C. § 608c(14) for violating the record keeping, reporting, and reserve requirements of the Almond Marketing Order, 7 C.F.R. § 981.1 et seq, a marketing order similar to the Marketing Order governing Plaintiffs. In *Balice*, the appellant almond handlers argued that the JO's decision to increase the fine from $1000 per violation to $2000 without requiring the USDA to demonstrate harm was arbitrary and capricious. In rejecting the appellant's argument, the Ninth Circuit looked at the language of the statute and found that to require the USDA to demonstrate harm "would contravene the express terms" of the statute. *Balice*, 203 F.3d at 694. Similarly, the express terms of 7 U.S.C. § 608c(14) require the USDA to demonstrate that a handler violated the marketing order, but do not require any further demonstration. Accordingly, this Court "declines to accept [Plaintiffs'] suggestion that the USDA was required to show harm to the government before the JO could" impose a penalty pursuant to 7 C.F.R. § 989.166(c).[7] *Balice*, 203 F.3d at 694.

---

[7] For this reason, the USDA was also not required to demonstrate harm before ordering Plaintiffs to compensate the RAC for the failure to hold the reserve raisins pursuant to 7 C.F.R. 989.166(c). Pursuant to the regulation, the USDA shall recover the amount of the loss from a handler who fails to deliver reserve tonnage raisins to the RAC. 7 C.F.R. § 989.166(c). No language in the regulation requires the USDA

Moreover, Plaintiffs' arguments misrepresent Plaintiffs' conduct and culpability. As set forth above, the JO did not err to find that Plaintiffs were subject to the Marketing Order as handlers that acquired raisins. Although they were handlers, Plaintiffs filed inaccurate reports, failed to obtain inspections, failed to hold raisins in reserve, and failed to allow access to records. As the Ninth Circuit explained in *Balice*, 203 F.3d at 699, these actions threaten to cause severe consequences to the entire industry:

> Balice willfully failed to maintain records for important transactions ... That violation largely frustrated the USDA's attempts to ensure that Balice was complying with other provisions of the Almond Marketing Order, and it interfered with the Almond Board's ability to set its economic policy.
>
> Even worse, Balice unlawfully disposed of reserve almonds, which were lawfully salable at only $0.05 to $0.08 per pound, when the prevailing market price for the almonds was $1.40 per pound. That conduct not only resulted in an illegal profit of roughly $246,677, but it also undermined the Secretary's efforts to protect the stability of the almond market.

Similarly, the USDA has an important need to control the stability of the raisin market, as expressed in the AMAA and the Marketing Order.

---

to demonstrate harm, and Plaintiffs point to no authority to construe the regulation in this way. Because Plaintiffs' suggestion that 7 C.F.R. § 989.166(c) requires the USDA to demonstrate "harm" contravenes the express terms of the regulation, this Court rejects it.

Like the actions of the *Balice* almond handlers, Plaintiffs' actions interfered with the RAC's ability to set its economic policy. Plaintiffs' introduction of the reserve raisins into the open market yielded illegal profits and could have resulted in market instability and a downward spiral in prices. Because of the serious nature of the Plaintiffs' conduct, with its severe and far-reaching effects, this Court finds that a $300 fine is not an excessive amount for each of Plaintiffs's violations, described above, and $1,000 is not an excessive fine for Plaintiffs' failure to allow access to their records. *See, Balice,* 203 F.3d 684; *Cole v. USDA,* 133 F.3d 803 (11th Cir.1998) (holding that a $400,000 penalty, representing a forfeiture of 75% of the sale price of over-quota tobacco, was not excessive given the legislative purpose of discouraging the over-supply of tobacco in the marketplace).[8]

C. Whether the reserve requirements violate the Fifth Amendment as a physical taking without just compensation

Plaintiffs argue that the reserve raisin program of the Marketing Order, 7 C.F.R. §§ 989.65–98, constitutes a physical taking of tangible property by the government without just compensation in violation of the Fifth Amendment to the United

---

[8] The instant action is distinguishable from the cases relied upon by the USDA in that the JO imposed both compensatory and civil penalties and assessments on Plaintiffs. In *Balice* and *Cole*, the JO imposed penalties pursuant to either one regulation or the other, but not both. Because Plaintiffs failed to raise this point, however, the Court need not address whether the distinction changes the Excessive Fines Clause analysis.

States Constitution. Plaintiffs assert, without citation, that the "elements necessary for a takings claim are present if (1) private property, (2) is taken, (3) for public use, (4) without just compensation." Pl. Memo, 20:3–4. Without citation, Plaintiffs argue that they "routinely evidenced and argued all these elements." Plaintiffs assert that raisins are personal, private property and the government has paid no just compensation for the reserve tonnage raisins that the USDA takes each year. Plaintiffs contend that although Congress may take actions to regulate the industry, "[n]o court has ever held that the Commerce Clause trumps, eliminates, or eviscerates the Takings Clause in a physical takings case." Thus, "[w]hile Congress may allow the permanent deprivation of a citizens [sic] physical property, the government must pay fair market value." Plaintiffs conclude: "The government can't have it both ways: it can't refuse to pay just compensation, and then penalize, monetarily, Plaintiffs for refusing to transfer title and possession to the government." *Id.* at ll. 14–16.

As introduced above, the Marketing Order creates the raisin reserve requirement program. The purpose of the reserve requirement program is to control the supply of raisins in the domestic market and, accordingly, to regulate the price of the commodity. "By regulating the amount of raisins in this market, the USDA can, in effect, regulate the price at which raisins are sold domestically." *Lion Raisins, Inc. v. U.S.*, 58 Fed. Cl. 391, 394 (2003). Accordingly, the "primary focus" of the market control program is to "maximize return to the grower." Daniel Bensing, *The Promulgation and Implementation of Federal Marketing Orders Regulating Fruit and Vegetable*

Crops Under the Agricultural Marketing Agreement Act of 1937, 5 San Joaquin Agric. L.Rev. 3, 6 (1995).

The reserve requirement program is administered by the RAC. By February 15 of each crop year, the RAC must recommend to the USDA the portion of the crop that should be made available to sale without restrictions ("free tonnage") and the portion that should be withheld from the market ("reserve tonnage"). 7 C.F.R. §§ 989.54(d), 989.65. Based on the RAC's recommendations, and after obtaining the approval of two-thirds of California raisin producers, or of producers of two-thirds of raisins "produced for market, the USDA promulgates a regulation fixing the percentages of "reserve tonnage" and "free tonnage" raisins. 7 U.S.C. §§ 608c(8) (A)-(B), 9(B)(i)-(ii); 7 C.F.R. §§ 989.55, 989.65. In *Lion III*, the court explained the reserve requirement program as follows:

> Free-tonnage raisins may be disposed of by the handler in any marketing channel. Producers receive immediate payment from handlers, at the field market price, for the free-tonnage raisins. The market price for the free-tonnage raisins, or the field price, is not set by the RAC, but is determined through a private bargaining process carried out between producers' and handlers' bargaining associations. Producers are not paid immediately for reserve raisins. Reserve-tonnage raisins are held by handlers for the account of the reserve pool, which is operated by the RAC. *Lion I*, 58 Fed.Cl. at 394. Reserve raisins are sold, as authorized by the RAC, in non-competitive outlets, such as school lunch programs. *Id.;* 7C.F.R. §§ 989.65–67. The statute provides for "the equitable

> distribution of the net return derived from the sale [of reserve pool raisins] among the persons beneficially interested therein." 7 U.S.C. § 608c(6)(E). The RAC is charged with selling the reserve raisins in a manner "intended to maxim[ize] producer returns and achieve maximum disposition of such raisins by the time reserve tonnage raisins from the subsequent crop year are available." 7 C.F.R. § 989.67(d)(1). Since the mid–1990's, the RAC has been using the reserve pool to support an industry export program that effectively blends down the cost of exported California raisins thereby allowing handlers to be price-competitive in export markets where prices are generally lower than the domestic market.

416 F.3d at 1360.

The Marketing Order requires handlers to separate raisins into two sets of bins—one for "free tonnage" and one for "reserve tonnage." 7 C.F.R. §§ 989.54, 989.55, 989.65, 989.66(b)(2). "The reserve raisins are not warehoused in any central location, but rather stored by handlers on their own premises, and are released for sale per the instructions of the RAC." *Lion III*, 416 F.3d at 1360. Title to the "reserve tonnage" portion of the producer's raisins automatically transfers to the RAC for sale in secondary, non-competitive markets. *See* 7 C.F.R. §§ 989.65, 989.66(a), (b) (1), (4). In exchange, "[p]roducers are entitled by regulation to an equitable distribution of the net proceeds from the RAC's disposition of the 'reserve tonnage' raisins." *Evans*, 74 Fed. Cl. at 557.

In crop year 2002–2003, the free tonnage was 53% and the reserve tonnage was set at 47% of a

producer's crop. The RAC sold the 2002 reserve pool for $970 per ton in 2004. None of the money the RAC received was paid back to the raisin producers. For the 2003–2004 crop year, the reserve tonnage was set at 30%.[9]

It is undisputed that every year, through the reserve requirement program, the RAC takes title to a significant portion of a California raisin producer's crop. The Court must determine here whether, as Plaintiffs argue, this constitutes a "physical taking" of their property by the government that requires just compensation under the Fifth Amendment. The federal government is liable in a Taking Clause suit for the actions of the RAC, as its agent. *Lion III*, 416 F.3d 1356. The issue of what constitutes a "taking" is a federal question governed by federal law. *Johnson v. U.S.*, 202 Ct.Cl. 405, 479 F.2d 1383 (Fed.Cir.1973). To determine the meaning of "property," and what property rights exist under the Fifth Amendment, federal courts look to local state law. *Richmond Elks Hall Ass'n v. Richmond Redevelopment Agency*, 561 F.2d 1327 (9th Cir.1977).

The Takings Clause does not prohibit the taking of private property, but instead places a condition on the exercise of that power. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 125 S.Ct. 2074, 161 L.Ed.2d 876 (2005). The Fifth Amendment is designed not to limit governmental interference with property rights per se, but rather to secure compensation in the event of an otherwise proper interference amounting to a

---

[9] The reserve tonnage percentage changes each year, sometimes radically. For example, the reserve tonnage portion was 62.5% in 1983 and 17.5% in 2005.

taking. *Id.* Here, the RAC takes title to Plaintiffs' reserve tonnage through the AMAA and the Marketing Order by operation of Congress's power to regulate the raisin industry through the Commerce Clause authority. *See United States v. Rock Royal Co-Op., Inc.*, 307 U.S. 533, 569, 572, 59 S.Ct. 993, 83 L.Ed. 1446 (1939) (upholding AMAA as constitutional under the Commerce Clause and rejecting Fifth Amendment due process and taking contentions, because "the Congress would have, clearly, the right to permit only limited amounts of milk to move in interstate commerce, [and therefore] it might permit the movement on terms of pool settlement here provided."); *see also, Evans*, 74 Fed. Cl. at 559 (discussing *Rock Royal*). Congress's power to regulate commerce, however, "does not immunize the federal government from a takings claim under the Fifth Amendment." *Evans*, 74 Fed. Cl. at 560. Thus, "the Commerce Clause may provide the authority for a taking, but it does not negate the Fifth Amendment's command that the government, having taken a person's property, must pay just compensation." *Id.* (citing *Yancey v. United States*, 915 F.2s 1534, 1540 (Fed.Cir.1990)).

The question presented to this Court is whether the transfer of title on the reserve tonnage raisins is a *physical* taking that requires compensation. The federal government may "take" private property, requiring just compensation, either by physical invasion or by regulation. *American Pelagic Fishing Co., L.P. v. U.S.*, 379 F.3d 1363 (Fed.Cir.), *cert. denied*, 545 U.S. 1139, 125 S.Ct. 2963, 162 L.Ed.2d 887 (2004). *Norman v. U.S.*, 63 Fed.Cl. 231 (2003), *aff'd*, 429 F.3d 1081, *cert. denied*, 547 U.S. 1147, 126 S.Ct. 2288, 164 L.Ed.2d 813 (2003). The distinction

between a "physical" taking and a "regulatory" taking is significant. *See, Brown v. Legal Foundation of Washington*, 538 U.S. 216, 123 S.Ct. 1406, 155 L.Ed.2d 376 (2003) (payment of compensation is required whenever the government acquires private property for a public but the text of the Just Compensation Clause contains no comparable reference to a regulatory taking). Whereas an invasion of a person's physical property will be considered a physical taking, a "taking" is less likely to be found when a party challenges the government's interference with a property interest that arises from some public program that adjusts benefits and burdens of economic life to promote the common good. *Sadowsky v. City of New York*, 732 F.2d 312 (2nd Cir.1984). Moreover, while physical takings are compensable, *see Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 427, 102 S.Ct. 3164, 73 L.Ed.2d 868 (1982), not all regulatory takings are. *See, Outdoor Graphics, Inc. v. City of Burlington*, 103 F.3d 690 (8th Cir.1996) (Whether particular restriction amounts to taking depends on economic impact of regulation on claimant, extent to which regulation has interfered with distinct, investment-backed expectations, and character of government regulation.). With this distinction in mind, this Court turns to Plaintiffs' argument that the reserve requirement constitutes a physical taking.

One other court has considered the issue at bar.[10] In *Evans*, 74 Fed. Cl. 554, the Court of Federal

---

[10] For other takings claims related to the raisin Marketing Order, *see Lion Raisins v. U.S.*, 58 Fed. Cl. 391 (2003) (Lion I); *Lion Raisins v.*

Claims considered whether the transfer of title to the reserve tonnage raisins constituted a physical taking. The *Evans* court noted that under California law, the plaintiffs "unquestionably held title to their raisins grown in their fields." 74 Fed. Cl. at 563. The court found that at the time the raisins become subject to regulation under the Marketing Order (when the handler acquires the raisins), "the producers acquired in exchange personal property consisting of cash (for the 'free tonnage' raisins) and an equitable interest in the net proceeds of the 'reserve tonnage' raisins." *Id.* The court understood this transfer, required under the Marketing Order, to render plaintiffs the following property interests: "Plaintiff producers retained a property interest in the raisins, and they retained a property interest in the proceeds from the raisins." The *Evans* court concluded that the transfer of reserve tonnage raisins was not a physical taking, because:

> although the RAC gains title to some of the raisins that plaintiffs grow, the transfer does not have the same consequences as, for example, entry by governmental officials upon their land for purposes of confiscating their rains would have. There is no physical invasion of property (citations omitted) ... nor is there any "direct appropriation of property." (citations omitted). Instead, the government is the recipient of a portion of the raisins that plaintiffs shipped to handlers subject to the marketing order.

74 Fed. Cl. at 563. In addition, the *Evans* court concluded that plaintiffs had no property interest in

---

U.S., 57 Fed. Cl. 435 (2003) (Lion II); and *Lion Raisins v. U.S.*, 416 F.3d 1356 (2005) (Lion III).

their reserve tonnage raisins. Without a property interest in the raisins, the Takings Clause was not implicated. The Court opined that "if plaintiffs have a takings claim, it would relate to their property interest, equitable in nature, in the net proceeds from the disposition of the 'reserve tonnage." ' *Id.* at 564. The court's conclusion that plaintiffs have no property interest in the reserve tonnage raisins is based on the following:

> In essence, plaintiffs are paying an admissions fee or toll-admittedly a steep one-for marketing raisins. The government does not force plaintiffs to grow raisins or to market the raisins; rather, it directs that if they grow and market raisins, then passing title to their "reserve tonnage" raisins to the RAC is the admission ticket.

Id.

This Court agrees, in part, with the *Evans* ruling to find that the transfer of title to the reserve tonnage does not constitute a *physical* taking. A physical taking generally occurs occur when there is a physical occupation of a person's property by the government. *Norman v. U.S.*, 63 Fed.Cl. 231, *aff'd*, 429 F.3d 1081, *cert. denied*, 547 U.S. 1147, 126 S.Ct. 2288, 164 L.Ed.2d 813 (2003); *Yee v. City of Escondido*, 503 U.S. 519, 112 S.Ct. 1522, 118 L.Ed.2d 153 (1992) physical taking occurs only where the government requires a landowner to submit to the physical occupation of his land). By contrast, a "regulatory taking" in violation of the Takings Clause may occur when government action, although

not encroaching upon or occupying private property, goes too far and still amounts to a taking. *Anaheim Gardens v. U.S.*, 444 F.3d 1309 (Fed.Cir.2006); *Norman*, 63 Fed. Cl. 231 (a regulatory taking occurs when a regulation deemed necessary to promote the public interest so imposes on the owner's property rights that, in essence, it effectuates a taking); *Allain–Lebreton Co. v. Department of Army, New Orleans Dist., Corps of Engineers*, 670 F.2d 43 (5th Cir.1982) (Where there is no physical invasion of or physical damage to a plaintiff's property by the government, the government can be held responsible for a taking only when its own regulatory activity is so extensive or intrusive as to amount to taking.). Thus, while it is not necessary that the government actually take physical possession of property in order for there to be a "taking," a physical invasion must take place for there to be a physical taking, which includes a physical taking requires a "permanent physical occupation" on one's land. *Ridge Line, Inc. v. U.S.*, 346 F.3d 1346 (Fed.Cir.2003); *see also, e.g., Loretto*, 458 U.S. at 421 (cable televison company's installation of its cable facilities on plaintiff's property). In *Palazzolo v. Rhode Island*, 533 U.S. 606, 121 S.Ct. 2448, 150 L.Ed.2d 592 (2001), the Supreme Court explained the distinction:

> The clearest sort of taking occurs when the government encroaches upon or occupies private land for its own proposed use. Our cases establish that even a minimal "permanent physical occupation of real property" requires compensation under the Clause. *Loretto v. Teleprompter Manhattan CA TV*

> *Corp.*, 458 U.S. 419, 427, 102 S.Ct. 3164, 73 L.Ed.2d 868 (1982). In *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 43 S.Ct. 158, 67 L.Ed. 322 (1922), the Court recognized that there will be instances when government actions do not encroach upon or occupy the property yet still affect and limit its use to such an extent that a taking occurs. In Justice Holmes' well-known, if less than self-defining, formulation, "while property may be regulated to a certain extent, if a regulation goes too far it will be recognized as a taking." *Id.*, at 415, 260 U.S. 393, 43 S.Ct. 158, 67 L.Ed. 322.

Id. at 617. According to the Palazzolo court, "government actions [that] do not encroach upon or occupy property yet still affect and limit" use of property are "regulatory taking[s]." *Id.*

Here, Plaintiffs do not demonstrate a physical taking of their raisins by the government. The RAC gains title of Plaintiffs' reserve tonnage raisins by operation of the federal regulation of the Marketing Order. The government does not physically invade Plaintiffs' land to take the raisins, nor does the government take physical possession of the raisins. The reserve tonnage remains in the possession of the handlers. Moreover, the transfer of title is not absolute. Plaintiffs retain an equity interest in their reserve tonnage raisins. Based on these considerations, this Court finds that Plaintiffs have failed to establish that reserve raisin program of the Marketing Order constitutes a physical taking. *See, Cienega Gardens v. U.S.*, 331 F.3d 1319

(Fed.Cir.2003) (Loss of 96% of possible rate of return on investment was "compensable regulatory taking" under Fifth Amendment, for precluding participants in government program from prepaying their mortgages after 20 years, and barring them from unregulated rental market and other more lucrative property uses); *c.f.*, *Rose Acre Farms, Inc. v. U.S.* 559 F.3d 1260 (Fed.Cir.2009) (egg producer did not suffer a compensable regulatory taking when, due to USDA's salmonella regulations, approximately 43% of its table eggs were diverted to the breaker egg market, thus reducing those eggs' market value by approximately 10%).[11] Because there is no physical taking, Plaintiffs' Fifth Amendment claim fails.[12]

D. Whether the JO's dismissal of Plaintiffs' administrative petition was arbitrary, capricious, and contrary to the law

Plaintiffs attempt to challenge the JO's February 8, 2007 order on Plaintiffs' administrative petition fails, as this Court lacks subject matter jurisdiction to consider Plaintiffs' claim. As a Court of limited

---

[11] Although the USDA relies on rulings related to other marketing orders to argue that Plaintiffs have no property interest in their raisins, this Court notes the distinctions between the raisin Marketing Order and the marketing orders of other commodities. Unlike most of the other marketing orders, the raisin marketing order "effects a direct transfer of title of a producer's 'reserve tonnage' raisins to the government, and it requires physical segregation of the reserve-tonnage raisins held for the government's account." *Evans*, 74 Fed. Cl. at 558. Thus, the government taking under the raisin Marketing Order is distinct and must be considered on its own facts.

[12] Although Plaintiffs do not establish a physical takings claim, Plaintiffs are not without recourse. In addition to a regulatory takings claim, and as fully explained in *Evans*, Plaintiffs have at least three other legal theories they could present to challenge the reserve requirement. 74 Fed. Cl. at 564–65.

jurisdiction, this Court must consider whether subject matter jurisdiction exists and dismiss an action if jurisdiction is lacking. *Southern Pacific Transportation Co. v. City of Los Angeles*, 922 F.2d 498, 502 (9th Cir.1990), *cert. denied*, 502 U.S. 943, 112 S.Ct. 382, 116 L.Ed.2d 333 (1991); *see also*, Fed.R.Civ.P. 12(h) (3) ("If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action.").

Plaintiffs' appeal of the JO's dismissal of Plaintiffs' administrative petition is barred by the statute of limitations. The statutory provision for judicial review of a ruling on a petition to modify a marketing order is 7 U.S.C. 608c(15)(B), which provides:

> The District Courts of the United States ... in any district in which such handler is an inhabitant, or has his principal place of business, are hereby vested with jurisdiction in equity to review such ruling, *provided a bill in equity for that purpose is filed within twenty days from the date of the entry of such ruling.*

This statute is jurisdictional. *See, Kingman Reef Atoll Investments, L.L.C. v. U.S.*, 541 F.3d 1189, 1996 (9th Cir.2008); *see also, John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 128 S.Ct. 750, 753–56, 169 L.Ed.2d 591,(2008). Thus, this Court only has jurisdiction to review a handler's 7 U.S.C. § 608c(15)(B) appeal if that appeal is filed within twenty days. The JO issued its decision on February 4, 2008. Plaintiffs initiated this action on October 14, 2008. Accordingly, Plaintiffs' untimely challenge is

barred by the statute of limitations and this Court lacks jurisdiction to consider it. *See United States v. Bravo-Diaz*, 312 F.3d 995, 997 (9th Cir.2002) ("It is fundamental to our system of government that a court of the United States may not grant relief absent a constitutional or valid statutory grant of jurisdiction.").[13] Because this Court lacks jurisdiction over Plaintiffs' cause of action related to the 7 U.S.C. 608c(15)(B) petition, this Court must dismiss it, and cannot reach the merits of the parties' arguments.

VI. CONCLUSION AND ORDER

For the foregoing reasons, the Court GRANTS defendant USDA's summary judgment motion and DENIES Plaintiffs' summary judgment motion. The clerk of court is DIRECTED to enter judgment in favor of defendant USDA and against Plaintiffs and to close this action.

IT IS SO ORDERED.

---

[13] In addition, Plaintiffs' challenge to the JO's dismissal of Plaintiffs' administrative petition is the subject of a separate action. In that separate action, Plaintiffs' claims were dismissed as untimely. Plaintiffs appeal of that dismissal order is currently pending.

APPENDIX E

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

MARVIN D. HORNE, ET AL.,
v.
UNITED STATES DEPARTMENT OF AGRICULTURE,

JUDGMENT IN A CIVIL CASE

CASE NO: **1:08–CV–01549–LJO–SMS**

XX — Decision by the Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

THAT JUDGMENT IS HEREBY ENTERED IN ACCORDANCE WITH THE COURT'S ORDER OF 12/11/2009

Victoria C. Minor
Clerk of Court

ENTERED: **December 11, 2009**

by: /s/ S. Martin
Deputy Clerk

APPENDIX F

UNITED STATES DEPARTMENT OF AGRICULTURE

BEFORE THE SECRETARY OF AGRICULTURE

In re:	)	AMAA
	)	Docket No.
Marvin D. Horne and Laura R.	)	04-0002
Horne, d/b/a Raisin Valley Farms,	)	
a partnership and d/b/a Raisin	)	
Valley Farms Marketing	)	
Association, a/k/a Raisin Valley	)	
Marketing, an unincorporated	)	
association	)	
	)	
and	)	
	)	
Marvin D. Horne, Laura R.	)	
Horne, Don Durbahn, and	)	
The Estate of Rena Durbahn, d/b/a	)	
Lassen Vineyards, a partnership,	)	
	)	
Respondents	)	

Order Granting Petition To Reconsider

PROCEDURAL HISTORY

On December 8, 2006, Administrative Law J
Victor W. Palmer [hereinafter the ALT] issu
Decision and Order in which he found that M
D. Horne, Laura R. Horne, Don Durbahn, and
Durbahn, now deceased, acting together as par
doing business as Lassen Vineyards,[1] at all
material to this proceeding, acted as a handl
raisins subject to the inspection, assessi
reporting, verification, and reserve requiremer
the federal order regulating the handling of Ra
Produced from Grapes Grown in California (7 C
pt. 989) [hereinafter the Raisin Order]. The
further found that Mr. Horne and partners vio
the Agricultural Marketing Agreement Act of
as amended (7 U.S.C. §§ 601-674) [hereinafte
AMAA], and the Raisin Order by failing to o
inspections of acquired incoming raisins, faili
hold requisite tonnages of raisins in reserve, fa
to file accurate reports, failing to allow acce
their records, and failing to pay req
assessments. Pursuant to 7 U.S.C. § 608c(14)(B
ALJ assessed Mr. Horne and partners a $73
civil penalty and ordered payment of $523,03
the dollar equivalent of raisins not held in re
and $9,389.73 for owed assessments.

On January 4, 2007, Mr. Horne and partners f
timely petition for review of the ALJ's Decisio
Order. On April 11, 2008, I issued a Decisio
Order in which I found Mr. Horne and pa

---

[1] In this Order Granting Petition To Reconsider, I refer t
respondents, as well as the partnership Raisin Valley Fa
"Mr. Horne and partners" unless clarity dictates otherwis

violated the Raisin Order (7 C.F.R. §§ 989.66, .166) by failing to hold in reserve California Natural Sun-dried Seedless raisins and by failing to pay to the Raisin Administrative Committee [hereinafter the RAC] the dollar equivalent of the California raisins that were not held in reserve for crop year 2002-2003 and for crop year 2003-2004. Furthermore, I found that Mr. Home and partners violated section 989.80 of the Raisin Order (7 C.F.R. § 989.80) by failing to pay assessments to the RAC for crop year 2002-2003 and for crop year 2003-2004. In total, I found that Mr. Home and partners committed 673 violations of the Raisin Order. I ordered Mr. Home and partners to pay to the RAC $6,042.23 in assessments for crop years 2002-2003 and 2003-2004, and $183,006.51 for the dollar equivalent of the California raisins they failed to hold in reserve for crop years 2002-2003 and 2003-2004. Finally, I assessed a civil penalty of $202,600 against Mr. Home and partners for their violations of the Raisin Order.

On May 12, 2008, the Administrator, Agricultural Marketing Service, United States Department of Agriculture [hereinafter the Administrator], filed Complainant's Petition to Reconsider the Decision and Order of the Judicial Officer [hereinafter the Petition to Reconsider]. In the Petition to Reconsider, the Administrator alleged that the calculation of the assessments owed to the RAC by Mr. Home and partners, as well as the calculations for the value of the raisins that Mr. Home and partners failed to hold in reserve are not correct and should be modified. On June 3, 2008, Mr. Home and partners filed Respondents' Opposition to Plaintiff's [sic] Petition to Reconsider [hereinafter Opposition to Petition to Reconsider]. In their Opposition to

Petition to Reconsider, Mr. Home and partners argue four issues:

a. **The Administrator's Petition to Reconsider fails to meet the requirements of section 1.146(a)(3) of the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary [hereinafter the Rules of Practice] (7 C.F.R. § 1.146(a)(3));**

b. **The Administrator's suggested calculations cannot be confirmed by resort to the evidence;**

c. **The proposed reconsideration is inconsistent with the law; and**

d. **A custom or "toll" packer of raisins does not "acquire" raisins.**

The Raisin Order mandates record keeping and reporting requirements that are necessary for the implementation of the Raisin Order (7 C.F.R. §§ 989.73, .77). Without such reports and without access to the documents that support these reports, it is difficult for the Agricultural Marketing Service [hereinafter AMS] and the RAC to properly determine the volume of raisins handled as well as the assessments and other monies due. Mr. Horne and partners failed to provide necessary documents until just before the second portion of the hearing on May 23, 2006.

I have spent considerable time examining the record in this proceeding. It appears that the

document universe, entered into the record just prior to the second portion of the hearing, is likely missing some documents, while it contains duplicates of others. Determining exact volumes of raisins that flowed through Mr. Horne and partners' facility is difficult.

On June 19, 2008, I issued an Order Seeking Clarification in which I ordered the Administrator to explain how he reached the total weights used in calculating the amounts owed by Mr. Home and partners. On July 11, 2008, the Administrator filed Administrator's Response to the Judicial Officer's Order Seeking Clarification. The response provides guidance for me to use in determining the appropriate amounts owed by Mr. Home and partners to the RAC for the assessments and for the dollar equivalent of California raisins that Mr. Home and partners failed to hold in reserve. The Administrator's analysis explained how AMS reached the proposed assessment amounts and the amounts owed for raisins that Mr. Home and partners failed to hold in reserve. The analysis contained a citation to each relevant exhibit noting the weight of the raisins sold on the invoice in the exhibit.

Finally, on August 4, 2008, Mr. Home and partners filed Respondents' Submission Opposing the Administrator's Response to an Order Seeking Clarification, This filing was Mr. Home and partners' opportunity to challenge the Administrator's numbers.

Mr. Home and partners did not challenge any of the weights or calculations presented in the Administrator's Response to the Judicial Officer's

Order Seeking Clarification. Therefore, I find Mr. Home and partners accept the Administrator's numbers as accurate and waive the opportunity to contest the numbers.

DISCUSSION

As I discussed in my April 11, 2008, Decision and Order, there are three components of the Order that mandate Mr. Home and partners make monetary payments as a result of their violations of the Raisin Order (Decision and. Order at 32-40), First, the Raisin Order requires a handler, who fails to deliver reserve tonnage, to compensate the RAC, as follows:

> **§ 989.166 Reserve tonnage generally.**
>
> . . . .
>
> (c) *Remedy in the event of failure to deliver reserve tonnage raisins.* A handler who fails to deliver to the Committee, upon request, any reserve tonnage raisins in the quantity and quality for which he has become obligated . . . shall compensate the Committee for the amount of the loss resulting from his failure to so deliver.

7 C.F.R. § 989.166(c).

This provision of the Raisin Order leaves me no discretion on the matter and requires that I order Mr. Horne and partners to compensate the RAC for the reserve tonnage raisins they failed to deliver to the RAC. The Raisin Order also instructs me as to how to calculate the compensation owed by Mr. Horne and partners to the RAC.

> **§ 989.166 Reserve tonnage generally.**

. . . .

(c) *Remedy in the event of failure to deliver reserve tonnage raisins.* . . . The amount of compensation for any shortage of tonnage shall be determined by multiplying the quantity of reserve raisins not delivered by the latest weighted average price per ton received by producers during the particular crop year for free tonnage raisins of the same varietal type or types[.]

7 C.F.R. § 989.166(c).

Mr. Horne and partners argued in their Opposition to Petition to Reconsider that the Administrator's calculations cannot be confirmed by resort to the evidence (Opposition to Pet. to Reconsider at 2). Mr. Horne and partners' argument has some validity for the 2002-2003 crop year, in that, without additional clarification, the determination of the weight of the raisins handled by Mr. Home and partners for the 2002-2003 crop year, is difficult. Because of this difficulty, I ordered the Administrator to clarify his calculations of the weight of the raisins. The Administrator's Response to the Judicial Officer's Order Seeking Clarification provides the necessary clarification. Mr. Home and partners were given the opportunity to respond to the Administrator's clarifications. Mr. Home and partners filed Respondents' Submission Opposing the Administrator's Response to an Order Seeking Clarification. However, in this submission, Mr. Home and partners do not challenge the Administrator's numbers and the exhibits that support the numbers. Therefore, I find Mr. Home and partners accept the Administrator's process for determining the weight of raisins handled as

accurate and Mr. Home and partners waive any challenge to the Administrator's conclusions regarding the weight of the raisins.

The Administrator did not challenge my findings regarding the weight of the raisins handled by Mr. Home and partners in the 2003-2004 crop year. Furthermore, Mr. Home and partners did not challenge the numbers I used in calculating the reserve tonnage for the 2003-2004 crop year. Therefore, I find that the Administrator and Mr. Home and partners accept, as accurate, the weights used by me in my April 11, 2008, Decision and Order for the 2003-2004 crop year.

The final component necessary for the calculation of the value of the raisins Mr. Home and partners failed to hold in reserve is the "latest weighted average price per ton received by producers during the particular crop year for free tonnage raisins of the same varietal type or types." (7 C.F.R. § 989.166(c).) In my April 11, 2008, Decision and Order, I used the "producer price" to calculate the reserve payment requirement. The Administrator argues that the appropriate price is the "announced price" found in the January 10, 2003, letter to the RAC from the Raisin Bargaining Association (CX 583). In *Lion Raisins, Inc. v. United States*, 416 F.3d 1356, 1360 (Fed. Cir. 2005), the United States Court of Appeals for the Federal Circuit held that the "market price for free-tonnage raisins, or the field price, is not set by the RAC, but is determined through a private bargaining process carried out between producers' and handlers' bargaining associations." The Administrator's "announced price" (CX 583 at 2) meets the Federal Circuit's

definition of market price; therefore, I use the "announced price" found in the January 10, 2003, letter as the price for calculating the value of the raisins that Mr. Home and partners failed to hold in reserve.

In the 2002-2003 crop year, Mr. Horne and partners packed out 1,266,924 pounds of raisins (Exhibit B to the Administrator's Response to the Judicial Officer's Order Seeking Clarification). Applying the shrinkage factor of 0.93857 (CX 92 at 6) for weight loss during processing, Mr. Horne and partners received 1,349,844.9769 pounds of raisins in the 2002-2003 crop year. The reserve obligation for the 2002-2003 crop year was 47 percent (CX 88 at 2-3). Mr. Home and partners' reserve obligation for that crop year was 634,427.1392 pounds (.47 x 1,349,844.9769 = 634,427.1392). The announced price for raisins was $745 per ton (CX 583 at 2-3). Therefore, for the 2002-2003 crop year, Mr. Home and partners owe $236,324.13 to the RAC for compensation for failing to deliver any reserve raisins to RAC (634,427.1392 pounds divided by 2,000 pounds per ton = 317.2136 tons; 317.2136 tons x $745 per ton equals $236,324.13).

Similarly, for the 2003-2004 crop year, Mr. Home and partners packed out 1,965,650 pounds of raisins (CX 3-CX 56). These raisins included natural seedless raisins and other varieties. Applying the 2003-2004 shrinkage factor for each variety indicates that Mr. Home and partners received 2,066,066 pounds of raisins in the 2003-2004 crop year. Of the 2,066,066 pounds of raisins received, 2,037,196 pounds were natural seedless raisins subject to the 30 percent reserve obligation (CX 161). Mr. Borne

and partners' reserve obligation for the 2003-2004 crop year was 611,159 pounds (.30 x 2,037,196 = 611,158.8). The announced price for raisins was $810 per ton (CX 583 at 2-3). Therefore, for the 2003-2004 crop year, Mr. Home and partners owe $247,519.40 to the RAC for compensation for failing to deliver any reserve raisins to the RAC (611,159 pounds divided by 2,000 pounds per ton = 305.5795 tons; 305.5795 tons x $810 per ton equals $247,519.40). The total amount owed to the RAC by Mr. Home and partners for failing to deliver any reserve raisins to RAC is $483,843.53.

The Raisin Order also requires that each handler contribute to the costs associated with operating the RAC, as follows:

> **§ 989.80 Assessments.**
>
> (a) Each handler shall, with respect to free tonnage acquired by him, . . . pay to the committee, upon demand, his pro rata share of the expenses . . . which the Secretary finds will be incurred, as aforesaid, by the committee during each crop year. . . . Such handler's pro rata share of such expenses shall be equal to the ratio between the total free tonnage acquired by such handler . . . during the applicable crop year and the total free tonnage acquired by all handlers . . . during the same crop year.

7 C.F.R. § 989.80(a). The assessment rate was established at $8 per ton (CX 90).

As noted in this Order Granting Petition to Reconsider, *supra*, for the 2002-2003 crop year, Mr. Home and partners received 1,349,844.9769 pounds of natural seedless raisins. The reserve

obligation for the 2002-2003 crop year was 47 percent; therefore, the free tonnage was 53 percent (CX 88 at 2). Mr. Home and partners' free tonnage for natural seedless raisins in that crop year was 715,417.8378 pounds (.53 x 1,349,844.9769 = 715,417.8378). In addition, Mr. Home and partners received 25,523.0198 pounds of other variety raisins. There was no reserve requirement for those raisins; therefore, all of those other variety raisins were subject to the assessment. Mr. Home and partners' assessment obligation for the 2002-2003 crop year for natural seedless raisins is $2,861.67 (715,417.8378 pounds divided by 2,000 pounds per ton = 357.7089 tons; 357.7089 tons x $8 per ton = $2,861.67). The assessment obligation for the other varieties is $102.09 (25,523.0198 pounds divided by 2,000 pounds per ton 12.7615; 12.7615 tons x $8 per ton = $102.09). The total assessment owed for the 2002-2003 crop year is $2,963.76.

Mr. Home and partners received 2,066,066 pounds of raisins in the 2003-2004 crop year. Of the 2,066,066 pounds of raisins received, 2,037,196 pounds were natural seedless raisins subject to the 30 percent reserve obligation (CX 161). The free tonnage of natural seedless raisins was 1,426,037.2 pounds (.70 x 2,037,196 = 1,426,037.2). In addition, there were 28,870 pounds of other varieties which were all free tonnage (2,066,066 - 2,037,196 28,870). Thus, the total free tonnage for the 2003-2004 crop year was 1,454,907.2 pounds. At an assessment rate of $8 per ton, Mr. Home and partners' assessment obligation for the 2003-2004 crop year is $5,819.63 (1,454,037.2 pounds divided by 2,000 pounds per ton 727.4536 tons; 727.4536 tons x $8 per ton = $5,819.63). The total assessment due to the RAC by

Mr. Home and partners for the 2002-2003 crop year and the 2003-2004 crop year is $8,783.39.

The third monetary payment resulting from Mr. Home and partners' violations of the Raisin Order are civil penalties. The AMAA authorizes civil penalties for violations of marketing orders, such as the Raisin Order, issued under the AMAA.

§ 608c. Orders

. . . .

(14) Violation of order

. . . .

(B) Any handler subject to an order issued under this section, or any officer, director, agent, or employee of such handler, who violates any provision of such order may be assessed a civil penalty by the Secretary not exceeding $1,000 for each such violation. Each day during which such violation continues shall be deemed a separate violation[.] . . . The Secretary may issue an order assessing a civil penalty under this paragraph only after notice and an opportunity for an agency hearing on the record. Such order shall be treated as a final order reviewable in the district courts of the United States in any district in which the handler subject to the order is an inhabitant, or has the handler's principal place of business. The validity of such order may not be reviewed in an action to collect such civil penalty.

7 U.S.C. § 608c(14)(B) (Supp. V 2005).[2]

As neither Mr. Horne and partners nor the Administrator challenged the amount of the civil penalties imposed in my April 11, 2008, Decision and Order, those civil penalties stand. As discussed in my April 11, 2008, Decision and Order, I find Mr. Horne and partners committed the following violations:

1. Twenty violations of section 989.73 of the Raisin Order (7 C.F.R. § 989.73) by filing inaccurate reporting forms with the RAC on 20 occasions.

2. Fifty-eight violations of section 989.58(d) of the Raisin Order (7 C.F.R. § 989.58(d)) by failing to obtain incoming inspections of raisins on 58 occasions.

3. Two violations of section 989.80 of the Raisin Order (7 C.F.R. § 989.80) by failing to pay assessments to the RAC in crop year 2002-2003 and crop year 2003-2004.

4. Five hundred ninety-two violations of sections 989.66 and 989.166 of the Raisin Order (7 C.F.R. §§ 989.66, .166) by failing to hold raisins in reserve and by failing to

---

[2] Pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended (28 U.S.C. § 2461 note), the Secretary of Agriculture, by regulation, adjusted the civil monetary penalty that may be assessed under the AMAA (7 U.S.C. § 608c(14)(B)) for each violation of a marketing order, by increasing the maximum civil penalty from $1,000 to $1,100 (7 C.F.R. § 3.91(b)(1)(vii) (2005)).

pay the RAC the dollar equivalent of the raisins not held in reserve.

5. One violation of section 989.77 of the Raisin Order (7 C.F.R. § 989.77) by failing to allow AMS to have access to their records.

The appropriate civil penalties for these violations are: (1) $300 per violation for filing inaccurate reporting forms, in violation of 7 C.F.R. § 989.73, for a total of $6,000; (2) $300 per violation for the failure to obtain incoming inspections, in violation of 7 C.F.R. § 989.58(d), for a total of $17,400; (3) $1,000 for the failure to allow access to records, in violation of 7 C.F.R. § 989.77; (4) $300 per violation for the failure to pay the assessments, in violation of 7 C.F.R. § 989.80, for a total of $600; and (5) $300 per violation for the failure to hold raisins in reserve, in violation of 7 C.F.R. §§ 989.66, .166, for a total of $177, 600. The total civil penalties assessed against Mr. Home and partners for violating the Raisin Order in the 2002-2003 and 2003-2004 crop years is $202,600. I conclude that civil penalties in these amounts are sufficient to deter Mr. Home and partners from continuing to violate the Raisin Order and will deter others from similar future violations.

Mr. Home and partners did not seek reconsideration of my April 11, 2008, Decision and Order; however, they did file an Opposition to Petition to Reconsider. In their opposition, Mr. Home and partners raised four points:

1. that the Administrator's Petition for Reconsideration fails to meet the requirements of section

1.146(a)(3) of the Rules of Practice (7 C.F.R. § 1.146(a)(3));

2. **that the Administrator's suggested calculations cannot be confirmed by resort to the evidence;**

3. **that the proposed reconsideration is inconsistent with the law; and**

4. **that a custom or "toll" packer of raisins does not "acquire" the raisins.**

Mr. Horne and partners argue that the Petition for Reconsideration failed to meet the requirements of section 1.146(a)(3) of the Rules of Practice (7 C.F.R. § 1.146(a)(3)), in that "there is no section of the Petition devoted to a description of errors made." (Opposition to Pet. to Reconsider at 1.) The Rules of Practice do not require a specific format for petitions to reconsider. The only requirement is that the "petition must state specifically the matters claimed to have been erroneously decided and the alleged errors must be briefly stated." (7 C.F.R. § 1.146(a)(3).) The Administrator's Petition to Reconsider clearly meets that requirement. It was easy to discern, from the Petition to Reconsider, the ...ors that the Administrator claimed I made in my April 11, 2008, Decision and Order. I find that the Administrator's Petition to Reconsider meets the requirements of the Rules of Practice.

Next, Mr. Horne and partners claim "that the Administrator's suggested calculations cannot be confirmed by resort to the evidence." While 1 agree

that the Administrator's filings do not present the image of clarity — which is why I ordered the Administrator to provide clarification —I found that I was able to follow the transactions identified in Exhibits A and B to the Administrator's Response to the Judicial Officer's Order Seeking Clarification. Therefore, using Exhibits A and B to the Administrator's response, I was able to determine the volume of raisins that flowed through Mr. Home and partners' facility and the tonnage of raisins that they failed to hold in reserve, as well as the assessments and the payments in lieu of reserve raisins that Mr. Home and partners owed to the RAC.

Mr. Home and partners' third point is that "the proposed reconsideration is inconsistent with the law." Mr. Home and partners are challenging the constitutionality of the Raisin Order. As I discussed in my April 11, 2008, Decision and Order, I have no authority to determine the constitutionality of the various statutes administered by the United States Department of Agriculture. *Califano v. Sanders*, 430 U.S. 99, 109 (1977) ("Constitutional questions obviously are unsuited to resolution in administrative hearing procedures"); *Robinson v. United States*, 718 F.2d 336, 338 (10th Cir. 1983) ("The agency is an inappropriate forum for determining whether its governing statute is constitutional"). Therefore, Mr. Home and partners' questioning of the constitutionality of the Raisin Order falls on legally deaf ears. I need not point out to Mr. Home and partners that the Court of Federal Claims recently found the arguments made in this appeal to be unavailing. *Evans v. United States*, 74 Fed. Cl. 554 (2006). The United States Court of

Appeals for the Federal Circuit affirmed the Court of Federal Claims Decision, 250 F. App'x 231 (2007), and the Supreme Court of the United States denied a petition for certiorari, 128 S. Ct. 1292 (2008). Until the appropriate court instructs me otherwise, I will treat the Raisin Order as constitutional, as I believe it to be.

As I discussed in my April 11, 2008, Decision and Order, the reference to Farmer-to-Consumer Direct Marketing Act of 1976 (7 U.S.C. §§ 3001-3006) provides Mr. Home and partners little solace. They argue that it exempts them from handler obligations under the Raisin Order because they were attempting to promote the policy of that statute. The ALJ found this argument "patently specious" and I agree. The Farmer-to-Consumer Direct Marketing Act does not exempt raisin producers from the requirements of the Raisin Order.

Furthermore, the type of activity that the Farmer-to-Consumer Direct Marketing Act sought to encourage was the farmers market where farmer and consumer could come together directly and avoid middlemen. Mr. Home and partners presented no evidence that their activities, in fact, supported the goals of the Farmer-to-Consumer Direct Marketing Act. Mr. Home and partners sold raisins in wholesale packaging and quantities, frequently to candy makers and other food processors as ingredients for other food products. Mr. Home and partners showed no connection between their business activities and the goals of the Farmer-to-Consumer Direct Marketing Act. Therefore, even if the Farmer-to-Consumer Direct Marketing Act exempted raisin producers from the mandates of the

Raisin Order — which it does not — Mr. Home and partners failed to demonstrate compliance with the goals of the Farmer-to-Consumer Direct Marketing Act.

The final issue raised by Mr. Home and partners is whether a custom or "toll" packer of raisins "acquires" the raisins, This issue was discussed in my April 11, 2008, Decision and Order. A handler becomes a "first handler" when he "acquires" raisins, a term specifically and plainly defined by the Raisin Order:

§ 989.17 Acquire.

> *Acquire* means to have or obtain physical possession of raisins by a handler at his packing or processing plant or at any other established receiving station operated by him: . . . Provided further, That the term shall apply only to the handler who first acquires the raisins.

7 C.F.R. § 989.17.

The record demonstrates that Mr. Home and partners, in their operation of the packing house known as Lassen Vineyards, were first handlers who acquired raisins during crop years 2002-2003 and 2003-2004. Mr. Home and partners' arguments that they did not acquire raisins are unavailing in light of the plain meaning of the language of the Raisin Order defining the term "acquire." Moreover, if there were any ambiguity, the interpretation given by the United States Department of Agriculture, both at the time of the issuance of the Raisin Order and in subsequent correspondence with the Homes, is clear, straightforward, of long-standing, and controlling. See *Barnhart v. Walton*, 535 U.S. 212 (2002);

Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984).

The 1949 recommended decision regarding the raisin growers' request for the Raisin Order, which was adopted as part of the Secretary of Agriculture's final decision, explained the language employed and clarified that:

> The term "acquire" should mean to obtain possession of raisins by the first handler thereof. The significance of the term "acquire" should be considered in light of the definition of "handler" (and related definitions of "packer" and "processor"), in that the regulatory features of the order would apply to any handler who acquires raisins. Regulation should take place at the point in the marketing channel where a handler first obtains possession of raisins, so that the regulatory provisions of the order concerning the handling of raisins would apply only once to the same raisins. Numerous ways by which handlers might acquire raisins were proposed for inclusion in the definition of the term, the objective being to make sure that all raisins coming within the scope of handlers' functions were covered and, conversely, to prevent a way being available whereby a portion of the raisins handled in the area would not be covered. Some of the ways by which a handler might obtain possession of raisins include: (i) Receiving them from producers, dehydrators, or others, whether by purchase, contract, or by arrangement for toll packing, or packing for a cash consideration[.]

14 Fed. Reg. 3083, 3086 (June 8, 1949).

This interpretation is consistent with testimony at the hearing conducted to consider the need of the raisin industry for a marketing order and its appropriate terms:

> Q Mr. Hoak, suppose a packer stems, cleans, and performs other operations connected with the processing of raisins for a producer and then the producer sells the raisins to another packer. Under this proposal, which person should be required to set the raisins aside?
>
> A The man who performs the packing operation, who is the packer.
>
> Q Mr. Hoak, I believe that you have testified earlier that the term "packer" should include a toll packer. By that do you mean that it should include a person who takes raisins for someone else for a fee?
>
> A That is right.
>
> Q Also, did I understand you to say that that person should be the one who would be required to set aside or establish the pools under the regulatory provisions?
>
> A That is right. He is the man who would be held responsible for setting aside the required amount of raisins.
>
> Q I take it that that man would not have title to any raisins insofar as he is a toll packer; is that correct?
>
> A That is right.

AU Decision and Order, App. A.

These excerpts from the recommended decision and the hearing transcript were sent to an attorney representing Mr. and Mrs. Home on April 23, 2001. Apparently, they believe their personal interpretation of the term "acquire" as used in the Raisin Order should take precedence over the plain language of the Raisin Order and the interpretation of its meaning that was conveyed to them by the United States Department of Agriculture. The decision of Mr. Home and partners not to follow the United States Department of Agriculture's interpretative advice, and, instead, to play a kind of shell game with interlocking partnerships and a marketing association to try to conceal their role as first handler, only shows that they acted willfully and intentionally when they decided not to file accurate reports, not to hold raisins in reserve, not to have incoming raisins inspected, not to pay assessments, and not to allow inspection of their records for verification purposes.

In simple terms, Mr. Horne and partners, as a matter of law, acquired raisins, as first handlers, when raisins arrived at the processing/packing facility known as Lassen Vineyards. Their arguments that title to the raisins never transferred from the grower to Mr. Home and partners under California law is unavailing. California law does not control, the Raisin Order does. Under the Raisin Order, the term "acquire" is a term of art that does not encompass an ownership interest but rather physical possession. Mr. Home and partners obtained physical possession of— thus they "acquired" — raisins when a grower brought raisins to the facility.

For the foregoing reasons, I grant the Administrator's Petition to Reconsider and issue the following Order.

ORDER

1. Marvin D. Home, Laura R. Home, Don Durbahn, Lassen Vineyards, a partnership, and Raisin Valley Farms, a partnership, jointly and severally, are assessed a $202,600 civil penalty. The civil penalty shall be paid by certified check or money order made payable to the "Treasurer of the United States" and sent to:

> Frank Martin, Jr.
> United States Department of Agriculture
> Office of the General Counsel
> Marketing Division
> Room 2343-South Building
> Washington, DC 20250-1417

Payment of the civil penalty shall be sent to Mr. Martin within 100 days after this Order becomes effective.

2. Marvin D. Home, Laura R. Home, Don Durbahn, Lassen Vineyards, a partnership, and Raisin Valley Farms, a partnership, jointly and severally, are ordered to pay to the RAC $8,783.39 in assessments for crop years 2002-2003 and 2003-2004, and $483,843.53 for the dollar equivalent of the California raisins they failed to hold in reserve for crop years 2002-2003 and 2003-2004. Payments of the $8,783.39 for owed assessments and of the $483,843.53 for the dollar equivalent of the California raisins that were not held in reserve shall

be sent to the RAC within 100 days after this Order becomes effective.

3. This Order shall become effective on the day after service on Marvin D. Home, Laura R. Home, Don Durbahn, Lassen Vineyards, a partnership, and Raisin Valley Farms, a partnership.

RIGHT TO JUDICIAL REVIEW

Marvin D. Home, Laura R. Horne, Don Durbahn, Lassen Vineyards, a partnership, and Raisin Valley Farms, a partnership, have the right to obtain review of the Order in this Order Granting Petition To Reconsider in any district court of the United States in which they are inhabitants or have their principal place of business.[3]

Done at Washington, DC

September 18, 2008

William G. Jenson
Judicial Officer

---

[3] 7 U.S.C. § 608414)(B).

APPENDIX G

UNITED STATES DEPARTMENT OF AGRICULTURE

BEFORE THE SECRETARY OF AGRICULTURE

In re:	)	AMAA
	)	Docket No.
Marvin D. Horne and Laura R.	)	04-0002
Horne, d/b/a Raisin Valley Farms,	)	
a partnership and d/b/a Raisin	)	
Valley Farms Marketing	)	
Association, a/k/a Raisin Valley	)	
Marketing, an unincorporated	)	
association	)	
	)	
and	)	
	)	
Marvin D. Horne, Laura R.	)	
Horne, Don Durbahn, and	)	
The Estate of Rena Durbahn, d/b/a	)	
Lassen Vineyards, a partnership,	)	
	)	
Respondents	)	

Decision and Order

PROCEDURAL HISTORY

The Administrator, Agricultural Marketing Service, United States Department of Agriculture [hereinafter the Administrator], instituted this disciplinary proceeding on April I, 2004, by filing a Complaint alleging that, during crop years 2002-2003 and 2003-2004, Marvin D. Home and Laura R. Home, d/b/a Raisin Valley Farms, did not comply with the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. §§ 601-674) [hereinafter the AMAA], and the federal order regulating the handling of Raisins Produced from Grapes Grown in California (7 C.F.R. pt. 989) [hereinafter the Raisin Order]. On October 25, 2004, the Administrator filed an Amended Complaint which made minor amendments to the Complaint. On August 10, 2005, with permission from Administrative Law Judge Victor W. Palmer [hereinafter the ALJ], the Administrator filed a Second Amended Complaint. In the Second Amended Complaint, the Administrator made amendments to conform the Complaint to the evidence presented at the hearing conducted on February 9-11, 2005, as well as to add Raisin Valley Farms Marketing Association, also known as Raisin Valley Marketing, an unincorporated association, and Marvin D. Home, Laura R. Home, Don Durbahn, and the Estate of Rena Durbahn, a partnership, d/b/a Lassen Vineyards, as parties to the proceeding.

Under the Raisin Order, handlers[1] who first handle the raisins are required to: (1) obtain

---

[1] The term "handler" means: (a) any processor or packer; (b) any person who places, ships, or continues natural condition

inspections of raisins acquired or received (7 C.F.R. § 989.5 8(d)); (2) hold acquired raisins designated as reserve tonnage for the account of the Raisin Administrative Committee [hereinafter the RAC] (7 C.F.R. §§ 989.66, .166); (3) file accurate reports with the RAC (7 C.F.R. § 989.73); (4) allow access to records to verify the accuracy of the records (7 C.F.R. § 989.77); and (5) pay assessments to the RAC (7 C.F.R. § 989.80).

Marvin D. Home and the other respondents dispute that they are handlers claiming they never obtained any raisins through purchase or transfer of ownership to any of the business entities that Mr. Home and his partners operate. Mr. Home and his partners argue they did not acquire raisins within the meaning of the Raisin Order. They further argue they are not subject to the requirements of the Raisin Order because they are farmers/producers who have acted in good faith to advance the stated policy of the Farmer-to-Consumer

---

raisins in the current of commerce from within the area to any point outside the area; (c) any person who delivers off-grade raisins, other failing raisins or raisin residual material to other than a packer or other than into any eligible non-normal outlet; or (d) any person who blends raisins: *Provided*, That blending shall not cause a person not otherwise a handler to be a handler on account of such blending if he is either: (1) a producer who, in his capacity as a producer, blends raisins entirely of his own production in the course of his usual and customary practices of preparing raisins for delivery to processors, packers, or dehydrators; (2) a person who blends raisins after they have been placed in trade channels by a packer with other such raisins in trade channels; or (3) a dehydrator who, in his capacity as a dehydrator, blends raisins entirely of his own manufacture (7 C.F.R. § 989.15).

Direct Marketing Act of 1976 (7 U.S.C. §§ 3001-3006).

The ALJ held an oral hearing in Fresno, California, on February 9-11, 2005 (Tr. I), and May 23, 2006 (Tr. II). Frank Martin, Jr., Office of the General Counsel, United States Department of Agriculture, represented the Administrator during the portion of the hearing conducted on February 9-11, 2005. Babak A. Rastgoufard, Office of the General Counsel, United States Department of Agriculture, joined Mr. Martin during the May 23, 2006, portion of the hearing. David A. Domina and Michael Stumo, DominaLaw Group, Omaha, Nebraska, represented Mr. Home and the other respondents.

On December 8, 2006, the ALJ issued a Decision and Order in which he found that Marvin D. Home, Laura R. Home, Don Durbahn, and Rena Durbahn, now deceased, acting together as partners doing business as Lassen Vineyards,[2] at all times material to this proceeding, acted as a handler of raisins subject to the inspection, assessment, reporting, verification, and reserve requirements of the Raisin Order. The All further found that Mr. Home and partners violated the AMAA and the Raisin Order by failing to obtain inspections of acquired incoming raisins, failing to hold requisite tonnages of raisins in reserve, failing to file accurate reports, failing to allow access to their records, and failing to pay requisite assessments.

---

[2] In this Decision and Order, I refer to these respondents, as well as the partnership Raisin Valley Farms, as "Mr. Horne and partners" unless clarity dictates otherwise.

The ALJ concluded that the Farmer-to-Consumer Direct Marketing Act of 1976 does not exempt farmers/producers who act as handlers from regulation under federal marketing orders. The ALJ further concluded that the violations by Mr. Home and partners require the entry of an order directing them to pay the RAC assessments they have failed to pay and to pay the RAC the dollar equivalent of the raisins they failed to hold in reserve. Moreover, the All concluded that the violations were deliberate and were designed to obtain an unfair competitive advantage over other California raisin handlers who were in compliance with the Raisin Order. Pursuant to 7 U.S.C. § 608414)(B), the ALJ assessed Mr. Home and partners a $731,500 civil penalty and ordered payment of $523,037 for the dollar equivalent of raisins not held in reserve and $9,389.73 for owed assessments.

On January 4, 2007, Marvin D. Home and Laura R. Home, d/b/a Raisin Valley Farms, and Marvin D. Home, Laura R. Home, and Don Durbahn, a partnership, d/b/a Lassen Vineyards, filed a timely petition for review of the ALJ's Decision and Order and requested oral argument before the Judicial Officer. The request for oral argument before the Judicial Officer, which the Judicial Officer may grant, refuse, or limit (7 C.F.R. § 1.145(d)), is refused because the issues have been fully briefed; thus, oral argument would appear to serve no useful purpose.

DECISION

Findings of Fact

Marvin D. Home has been a farmer since 1969. Mr. Home and his wife Laura R. Home grow

Thompson seedless grapes for raisins. Their grape-growing and raisin-producing activities operate under the registered trademark "Raisin Valley Farms." Raisin Valley Farms is one of the largest operations in the California valley where most of the world's raisins are produced (Tr. I at 868-69). Marvin D. Horne and Laura R. Horne also do business as Raisin Valley Farms Marketing Association (also known as Raisin Valley Marketing). Both Raisin Valley Farms and Raisin Valley Farms Marketing Association have the same business mailing address in Kerman, California. (Tr. I at 873-74.)

During the 2002-2003 and 2003-2004 crop years, Marvin D. Horne and Laura R. Horne also operated a partnership with Laura's father, Don Durbahn, and Laura's mother, Rena Durbahn (now deceased). This partnership did business and continues to do business, as Lassen Vineyards, also in Kerman, California. Prior to 2002, Lassen Vineyards was exclusively a farming partnership that produced Thompson seedless grapes made into raisins (Tr. I at 870). In 2002, Lassen Vineyards started operating raisin packing plant equipment at the Kerman California, location (Tr. I at 871-73).

In 1998, Marvin D. Horne and Laura R. Horne expressed an interest to the RAC about acting as a handler of California raisins under the Raisin Order (CX 94). In 1999, Marvin D. Horne and Laura R. Horne filed a fictitious name certificate in the Fresno (California) County Clerk's Office in which they adopted the name "Raisin Valley Farms" (CX 95, CX 96). Then, for crop years 2001-2002, 2002-2003, and 2003-2004, Mr. and Mrs. Horne, under the Raisin

Valley Farms' name, filed RAC-5 forms, notifying the RAC of their intention to handle raisins as a packer under the Raisin Order (CX 98, CX 100, CX 102). During this time-frame, Mr. Horne served 6 years as an alternate member of the RAC (Tr. I at 175; CX 103, CX 104).

Lassen Vineyards is a partnership formed in 1995 by Marvin D. Horne, Laura R. Horne, Don Durbahn, and the late Rena Durbahn. The partnership was created "to engaged [sic] in farming and any other farming related business." (RX 12 at 1.) The partnership owned land in Kerman, California, where it produced raisins and operated a raisin packing plant. Don Durbahn and Marvin A. Horne, Mr. and Mrs. Marvin D. Horne's son, supervised the packing activities at Lassen Vineyards (Tr. I at 879-80). The workers who performed the packing activities at Lassen Vineyards were "leased employees" who were leased to Lassen Vineyards by a partnership of Laura R. Horne and Rena Durbahn (Tr. I at 933-34).

In crop years 2002-2003 and 2003-2004, Lassen Vineyards operated the packing plant to process (i.e., to stem, sort, clean, grade, and package) California raisins for themselves and, for a fee, for other raisin producers (Tr. I at 962; Tr. II at 25-27). During this time, Lassen Vineyards charged producers 12 cents per pound to pack raisins and $5 for each pallet upon which the boxed raisins were stacked (Tr. II at 28, 44). The cost for labor and packaging materials was included in the fee charged (Tr. II at 30-31, 44, 48). All raisins packed by Lassen Vineyards in crop years 2002-2003 and 2003-2004 were packaged in boxes stamped with the handler number 94-101. That

number had been assigned to Marvin D. Horne and Laura R. Horne (Tr. I at 964-65). When questioned, Mr. Horne indicated that the difference between Lassen Vineyards and a toll packer was that the packed product could leave Lassen Vineyards without the farmer being required to pay fees up front (Tr. I at 979).

On numerous occasions, Mr. Horne exchanged communications with the United States Department of Agriculture and the RAC concerning the Raisin Order, including his responsibilities under the Raisin Order (CX 94, CX 105-CX 110; RX 91-RX 103,

RX 105-RX 125, RX 127-RX 149). On March 15, 2001, Marvin D. Horne and Laura R. Horne, through their then attorney, wrote to the Secretary of Agriculture and asked whether the obligations of the Raisin Order regarding volume regulation, quality control, payment of assessments to the RAC, and reporting requirements would apply if Raisin Valley Farms had its raisins "custom packed" by a packer that would not take title to Raisin Valley Farms' raisins (RX 95). On April 23, 2001, the Deputy Administrator, Fruit and Vegetable Programs, United States Department of Agriculture, explained that under the scenario presented, Raisin Valley Farms would be neither a packer nor a handler, but that the custom packer would be both a packer and a handler. The Deputy Administer further explained that the custom packer "acquired" the raisins because it obtained physical possession of the raisins at a packing or processing plant. (7 C.F.R. § 989.17.) Furthermore, the custom packer would be "required to meet the order's obligations regarding volume regulation, quality control, payment of assessments

to the Raisin Administrative Committee (RAC), and reporting requirements." (RX 98.) The Deputy Administrator also provided Mr. Horne with portions of the 1949 proposed rule making and rule making hearing testimony discussing the treatment of this activity under the Raisin Order. The testimony establishes that the Raisin Order was intended to treat such custom packers (also called toll packers) as handlers (RX 98).

In a number of these communications, the Agricultural Marketing Service clearly informed Mr. Horne that his proposed activities would make him a handler subject to the Raisin Order. In a January 18, 2002, letter, Maureen T. Pello, Senior Marketing Specialist in the Fresno, California, Field Office of the Agricultural Marketing Service, told Mr. Home that his proposed activities would make him a handler under the Raisin Order.

As we discussed, based upon your description of your proposed activities, you would be considered a handler under the Federal marketing order for California raisins (order). As a handler, you would be required to meet all of the order's regulations regarding volume control, quality control (which includes incoming and outgoing inspection), assessments, and reporting to the Raisin Administrative Committee (RAC).

RX 100. On May 20, 2002, the Administrator responding to an e-mail and a letter sent by Mr. Home stated:

> You indicate in your correspondence that you plan to pack and market your own raisins. Such activities would make you a handler under the

> order. As a handler, you would be required to meet all of the order's regulations regarding volume control, quality control (incoming and outgoing inspection), assessments, and reporting to the RAC.

RX 101. Marvin D. Home expressly disregarded the United States Department of Agriculture's interpretations of the terms of the Raisin Order that he requested. Mr. Home did not use the custom packing firm to process his raisins, but rather, he elected to establish a family-owned packing operation at Lassen Vineyards where he packed raisins for his family, and, for a fee, Lassen Vineyards packed raisins for other growers (Tr. I at 977-78). Contrary to the advice Mr. Home received from the United States Department of Agriculture, Lassen Vineyards did not pay any assessments, did not have any incoming inspections performed, did not file accurate reports, and did not hold any raisins in reserve with respect to any of the raisins Lassen Vineyards received from and packed for growers during the 2002-2003 and 2003-2004 crop years (Tr. I at 965-73).

During crop years 2002-2003 and 2003-2004, Mr. and Mrs. Home also operated an unincorporated grower association named "Raisin Valley Farms Marketing Association." Mr. and Mrs. Home created Raisin Valley Farms Marketing Association to "attract the market of buyers." (Tr. I at 876.) Sixty raisin growers were members of Raisin Valley Farms Marketing Association (Tr. II at 55). Membership in Raisin Valley Farms Marketing Association allowed the raisin growers to market their raisins under the

Homes' trade name "Raisin Valley Farms" (Tr. I at 874-78).

When a Raisin Valley Farms Marketing Association member sold raisins through the Raisin Valley Farms Marketing Association, the association collected the purchase price from the buyer and deducted Lassen Vineyards' fee for the packing services as well as an accounting fee for Raisin Valley Farms Marketing Association and a contribution for a fund to protect members from customers who fail to pay. If the sale was negotiated through a broker, Raisin Valley Farms Marketing Association deducted a brokerage fee. After all the deductions were taken, Raisin Valley Farms Marketing Association remitted the balance to the grower. (Tr. II at 50-52.) Mr. Home acknowledged that Lassen Vineyards benefitted from the fees it received from Raisin Valley Farms Marketing Association members (Tr. II at 52).

When Raisin Valley Farms Marketing Association received an order for raisins, Mr. Home contacted one of the Raisin Valley Farms Marketing Association members inquiring if the member would accept the price offered. When Mr. Home found a grower willing to accept the order, he told that grower when to bring the raisins to Lassen Vineyards' packing plant to be stemmed, sorted, cleaned, graded, and packaged (Tr. II at 55-57). The buyer picked up the packaged raisins and left a bill of lading. When the buyer paid for the raisins, Mr. Home deposited the funds into an account. Originally, the funds were deposited into an account in the name of Mr. and Mrs. Home. Mr. Home changed the account to one named "Raisin Valley

Farms Marketing, LLT." Now, Raisin Valley Farms Marketing Association has "a bone fide Association bank account" from which Mr. Home, for Raisin Valley Farms Marketing Association, disburses funds to Lassen Vineyards, the brokers, and the growers. (Tr. II at 58-60.)

On or about August 22, 2002, Marvin Home, on behalf of Raisin Valley Farms, submitted an inaccurate RAC-1 Form, Weekly Report of Standard Raisin Acquisitions, to the RAC. Mr. Home reported to the RAC that Raisin Valley Farms did not acquire any California raisins during the week ending August 3, 2002. (CX 62.) However, the record evidence shows that Raisin Valley Farms acquired more than 95,000 pounds of California raisins during this time period (CX 1, CX 2).

From September 5, 2003, to December 2, 2003, Laura Home and/or Marvin Home, on behalf of Raisin Valley Farms, submitted 13 inaccurate RAC-1 Forms, Weekly Report of Standard Raisin Acquisitions, to the RAC.[3] The Homes reported to the RAC that they did not acquire any California raisins during this time period (CX 63-CX 75). However, the record evidence leads to the conclusion that they acquired substantial amounts of California raisins during this time period (CX 3-CX 56).

From August 1, 2003, to November 30, 2003, Marvin Home, on behalf of Raisin Valley Farms,

---

[3] Each of the forms has the number "59" written on the upper left of the form. The number "59" is a packer number assigned by RAC for internal control (Tr. I at 189). In addition, each form has "Raisin Valley Farms" shown as the originating fax machine identifier (CX 63-CX 75).

submitted four inaccurate RAC-20 Forms, Monthly Reports of Free Tonnage Raisin Disposition, to the RAC (CX 76-CX 79). Mr. Horne reported to the RAC that he did not ship or dispose of any California raisins during this time period. However, the record evidence shows that Raisin Valley Farms shipped substantial amounts of California raisins during this time period (CX 3-CX 56, CX 247-CX 273).

During crop year 2002-2003, Marvin Home, on behalf of Raisin Valley Farms, submitted an inaccurate RAC-50 Form, Inventory of Free Tonnage Standard Quality Raisins on Hand, to the RAC (CX 80). Mr. Home reported to the RAC that Raisin Valley Farms did not have any California raisin inventories during this time period. However, the record evidence shows Raisin Valley Farms had inventories of California raisins in that Raisin Valley Farms was shipping substantial amounts of California raisins during this time period (CX 82-CX 87).

During crop year 2002-2003, Marvin Home, on behalf of Raisin Valley Farms, submitted an inaccurate RAC-51 Form, Inventory of Off-Grade Raisins on Hand, to the RAC (CX 81). Mr. Horne reported to the RAC that Raisin Valley Farms did not have any California raisin inventories during this time period. However, the record evidence shows Raisin Valley Farms had inventories of California raisins in that Raisin Valley Farms was shipping substantial amounts of California raisins during this time period (CX 1, CX 2, CX 81-CX 87).

During crop year 2002-2003, Mr. Horne and partners failed to obtain incoming inspections of

California raisins on at least six occasions (CX 82-CX 87; Tr. I at 966-67).[4]

During crop year 2003-2004, Mr. Horne and partners failed to obtain incoming inspections of California raisins on at least 52 occasions (CX 3-CX 54, CX 56; Tr. I at 966-67).

During crop year 2002-2003, Mr. Horne and partners failed to hold in reserve for 294 days approximately 49,350 pounds of California Natural Sun-dried Seedless raisins (CX 82-CX 87, CX 88 at 2, CX 92 at 6). The producer price for raisins was $394.85 per ton (CX 161 at 3). Therefore, for the 2002-2003 crop year, Mr. Home and partners failed to pay $9,742.93 to the RAC for compensation for failing to deliver any reserve raisins to the RAC.

During crop year 2003-2004, Mr. Horne and partners failed to hold in reserve for 298 days approximately 611,159 pounds of California Natural Sun-Dried Seedless raisins (CX 3-CX 56, CX 161). The producer price for raisins was $567 per ton (71 Fed. Reg. 29,565, 29,569 (May 23, 2006)). Therefore, for the 2003-2004 crop year, Mr. Home and partners failed to pay $173,263.58 to the RAC for compensation for failing to deliver any reserve raisins to the RAC. For this crop year, the RAC

---

[4] The record does not contain direct evidence that Mr. Home and partners "received" raisins but there is ample evidence that they "packed-out" raisins (CX 82-CX 87). Logic allows me to conclude that raisins cannot be "packed-out" unless they are received. Combine that conclusion with Mr. Home's testimony that incoming inspections were not obtained leads to the holding that Mr. Horne and partners violated the Raisin Order by not obtaining incoming inspections on the raisins. (Tr. I at 966-67.)

issued two demand letters to the respondents to deliver reserve California raisins or to pay the dollar equivalent (RX 136, RX 137).

During crop year 2002-2003, Mr. Horne and partners failed to pay assessments to the RAC of approximately $222.60. During crop year 2003-2004, Mr. Home and partners failed to pay assessments to the RAC of approximately $5,819.63.

Mr. Horne and partners failed to allow access to their records to the United States Department of Agriculture (CX 154; Tr. I at 422-24).

Conclusions of Law

1. The Secretary of Agriculture has jurisdiction in this matter.

2. On August 3, 2002, the respondents violated section 989.73(b) of the Raisin Order (7 C.F.R. § 989.73(b)) by submitting an inaccurate RAC-1 Form, Weekly Report of Standard Raisin Acquisitions, to the RAC.

3. From August 1, 2003, to November 30, 2003, the respondents violated section 989.73(b) of the Raisin Order (7 C.F.R. § 989.73(b)) by submitting 13 inaccurate RAC-1 Forms, Weekly Reports of Standard Raisin Acquisitions, to the RAC.

4. From August 1, 2003, to November 30, 2003, the respondents violated section 989.73(d) of the Raisin Order (7 C.F.R. § 989.73(d)) by submitting four inaccurate RAC-20 Forms, Monthly Reports of Free Tonnage Raisin Disposition, to the RAC.

5. The respondents violated section 989.73(a) of the Raisin Order (7 C.F.R. § 989.73(a)) by filing an

inaccurate RAC-50 Form, Inventory of Free Tonnage Standard Quality Raisins on Hand, to the RAC for crop year 2002-2003.

6. The respondents violated section 989.73(a) of the Raisin Order (7 C.F.R. § 989.73(a)) by filing an inaccurate RAC-51 Form, Inventory of Off-Grade Raisins on Hand, to the RAC for crop year 2002-2003.

7. The respondents violated section 989.58(d) of the Raisin Order (7 C.F.R. § 989.58(d)) by failing to obtain incoming inspections of California raisins on at least six occasions during crop year 2002-2003.

8. The respondents violated section 989.58(d) of the Raisin Order (7 C.F.R. § 989.58(d)) by failing to obtain incoming inspections of California raisins on 52 occasions during crop year 2003-2004.

9. The respondents violated sections 989.66 and 989.166 of the Raisin Order (7 C.F.R. §§ 989.66, .166) by failing to hold in reserve for 294 days approximately 49,350 pounds of California Natural Sun-dried Seedless raisins and by failing to pay to the RAC $9,742.93, the dollar equivalent of the California raisins that were not held in reserve for crop year 2002-2003.

10. The respondents violated sections 989.66 and 989.166 of the Raisin Order (7 C.F.R. §§ 989,66, .166) by failing to hold in reserve for 298 days approximately 611,159 pounds of California Natural Sun-Dried Seedless raisins and by failing to pay to the RAC $173,263.58, the dollar equivalent of the California raisins that were not held in reserve for crop year 2003-2004.

11. The respondents violated section 989.80 of the Raisin Order (7 C.F.R. § 989.80) by failing to pay assessments to the RAC of approximately $222.60 for crop year 2002-2003.

12. The respondents violated section 989.80 of the Raisin Order (7 C.F.R. § 989.80) by failing to pay assessments to the RAC of approximately $5,819.63 for crop year 2003-2004.

13. The respondents violated section 989.77 of the Raisin Order (7 C.F.R. § 989.77) by failing to allow access to their records to the United States Department of Agriculture.

Discussion

The handling of California raisins is subject to the requirements of the Raisin Order that resulted from a request of the California raisin industry. The industry made the request to the Secretary of Agriculture pursuant to the AM A.

In response to the request for a marketing order, the United States Department of Agriculture held a hearing in Fresno, California, on December 13-16, 1948. Based on the evidence received at the hearing, a decision was issued that recommended the promulgation of the Raisin Order. The recommendation included a rational basis for issuance of the Raisin Order and for its various provisions (14 Fed. Reg. 3083 (June 8, 1949)). Interested parties were given an opportunity to file written exceptions to the recommended decision. Ibid. Upon consideration of the exceptions that were filed and the record evidence presented at the hearing, the Secretary of Agriculture, on July 8, 1949, found that the issuance of the Raisin Order, as

set forth in the recommended decision, would effectuate the declared policy of the AMAA and ordered that a referendum be conducted among producers of raisin variety grapes grown in California to determine whether at least two-thirds of them favored its issuance (14 Fed. Reg. 3858, 3868 (July 13, 1949)). The referendum was conducted and the requisite percentage of producers was found to favor the Raisin Order's terms and provisions. Those terms and provisions, as periodically amended through subsequent rulemaking proceedings, were fully applicable and governed the handling of California raisins during the 2002-2003 and 2003-2004 crop years when Mr. Home and partners acted as first handlers of raisins.

Mr. Horne and partners raised 12 issues in their appeal. In issue 12, Mr. Home and partners contend the ALJ erroneously allowed the Administrator to add parties after the hearing was substantially completed.

Ordinarily, leave to amend should be freely given in the absence of prejudice to the opposing party. *Waits v. Weller*, 653 F.2d 1288, 1290 (9th Cir. 1981), citing *Wyshak v. City National Bank*, 607 F.2d 824, 826 (9th Cir. 1979). However, the issue of amending a complaint by adding an additional party after the initial hearing raises concerns. The decision to amend a complaint is within the discretion of the trial judge, keeping in mind the strong policy in favor of allowing amendment, and considering four factors: (1) bad faith, (2) undue delay, (3) prejudice to the opposing party, and (4) the futility of amendment. *Kaplan v. Rose*, 49 F.3d 1363, 1370 (9th Cir. 1994), *cert. denied*, 516 U.S. 810 (1995), citing *DCD*

Programs, Ltd. v. Leighton, 833 F.2d 183, 186 (9th Cir. 1987). Mr. Horne and partners, in their appeal, did not raise bad faith, delay, or futility as reasons for denying the amendments. Therefore, those issues are not before me.

Prejudice is the most important factor when determining if an amendment should be allowed. *Zeneth Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 330-31 (1971). The amendment of a complaint should be denied when a party suffers "undue prejudice" because of the amendment. *Chaveriat v. Williams Pipe Line Co.*, 11 F.3d 1420, 1430 (7th Cir. 1993). The determination whether there is sufficient prejudice to justify denying an amendment requires a balancing of the interests of the parties. The balancing

> entails an inquiry into the hardship to the moving party if leave to amend is denied, the reasons for the moving party failing to include the material in the original pleading, and the injustice resulting to the party opposing the motion should it be granted.

6 Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure § 1487 at 621-23 (2d ed. 1990).

For the reasons set forth below, I decline to reverse the All's decision to allow the Administrator to amend the Complaint and add additional parties. First, and foremost, the decision to allow an amendment of a complaint lies within the discretion of the ALI Absent evidence that the All abused that discretion, the decision should stand. Mr. Home and partners presented no argument to convince me that

the All abused his discretion. Furthermore, my own examination of the record convinces me that the ALJ's decision to allow the Administrator to add parties was correct.

The following transcript passage from Mr. Home's counsel's opening statement at the hearing on February 9, 2005, shows Mr. Home was warned about the possibility of the amendment.

> MR. DOMINA: Now, I want to return to the entities for just this brief moment. Lasson [sic] Vineyards, the partnership that consists of these two folks and Mrs. Home's parents, own this pack-line. They own the equipment inside this partnership, a California general partnership Lasson [sic] Vineyards, that partnership is a stranger to this case. Lasson [sic] Vineyards—
>
> ADMINISTRATIVE [LAW] JUDGE PALMER: I might give you a word of warning. I recall some decisions by the Judicial Officer, past decisions, reviewing our decisions, not mine particularly, but saying that you can amend these complaints as you go along and they may well amend it to include them.
>
> MR. DOMINA: I'm aware of those decisions and I appreciate your comment.

Tr. I at 58-59. Furthermore, in the order authorizing the amendment to the Complaint adding parties, the ALJ made clear that "the new parties will be given the opportunity to present any evidence they believe is necessary to fully defend themselves from the amended complaint's allegations." (August 3, 2005, Order Authorizing Amendment of the Complaint To Conform To the Evidence.) The ALJ held five

teleconferences with counsel between February 2006 and the hearing on May 23, 2006. At these teleconferences, the ALJ sorted out evidence, issues, and witness lists, issued subpoenas, and moved the hearing location at the request of Mr. Home's counsel. On the morning of the hearing, additional off-the-record conferences resolved many of the issues prior to the hearing. On the afternoon of May 23, 2006, the All presided over a hearing. Mr. Home was the primary witness. At the conclusion of the hearing, there was no claim that the added parties needed more time to present their evidence (Tr. II at 261).

Although Mr. Home and partners argue that the addition of the new parties should not have been allowed after the initial hearing, they must take significant responsibility for the Administrator's inability to identify all appropriate parties. On May 21, 2004, the ALJ set the date for the hearing as February 8-17, 2005, and ordered an exchange of witness lists, exhibit lists, and copies of exhibits. The ALJ ordered the Administrator to provide his documents by October 4, 2004. The Administrator filed his documents on September 20, 2004. The order also called for Mr. Home and partners to provide their documents on November 15, 2004. The All extended that deadline until December 15, 2004. The record does not indicate that Mr. Home and partners provided the documents in a timely fashion. On January 3, 2005, Mr. Home was served with a subpoena duces tecum (CX 164) seeking records regarding his raisin operations. In response, Mr. Home provided hearing exhibits RX 1-RX 152. Mr. Home admitted he did not fully comply with the

subpoena.[5] (Tr. I at 947.) Without Mr. Home's records, the Administrator's inability to identify all the various intermingled entities involved in Mr. Home's raisin operations before the initial hearing, is understandable.

Mr. Home's business structure is confusing at best. There appear to be three main entities, Raisin Valley Farms, Lassen Vineyards, and Raisin Valley Farms Marketing Association. The main problem is that at various times Mr. Home uses the name "Raisin Valley Farms" for each. Without Mr. Home's personal knowledge, it is impossible to know which bank account in the name of Raisin Valley Farms is the account for which company. In fact, there was not a bank account in the name of Lassen Vineyards. (Tr. II at 58-60, 123-24.)

Raisin Valley Farms is a partnership between Marvin D. Home and his wife Laura (Tr. I at 868). Mr. Home grows grapes and makes raisins under the Raisin Valley Farms name. The Raisin Valley Farms name is trademarked. (Tr. I at 869.) Lassen Vineyards is a partnership between Marvin Home, his wife Laura, and his father-in-law Don Durbahn.[6] (Tr. I at 869-70; RX 12.) Lassen Vineyards began as a farming operation, growing grapes and making raisins, adding a raisin packing facility on its property in 2002 (Tr. I at 870-71).

---

[5] I note that in November 2002, the Agricultural Marketing Service issued an investigative subpoena seeking Mr. Home's records (CX 154). Mr. Home "refuse[d] to produce any records" sought by the investigative subpoena (RX 106; Tr. I at 432).

[6] The partnership also included Laura Home's mother Rena Durbahn until Mrs. Durbahn passed away.

Another issue raised on appeal is Mr. Home and partners' position that the Farmer-to-Consumer Direct Marketing Act of 1976 (7 U.S.C. §§ 3001-3006) exempts them from handler obligations under the Raisin Order because they were attempting to promote the policy of that statute. The ALJ found this argument "patently specious" and I agree. The Farmer-to-Consumer Direct Marketing Act does not exempt raisin producers from the requirements of the Raisin Order.

Furthermore, the type of activity that the Farmer-to-Consumer Direct Marketing Act sought to encourage was the farmers market where farmer and consumer could come together directly and avoid middlemen. Mr. Home and partners presented no evidence that their activities, in fact, supported the goals of the Farmer-to-Consumer Direct Marketing Act, Mr. Home and partners sold raisins in wholesale packaging and quantities, frequently to candy makers and other food processors as ingredients for other food products. Mr. Home showed no connection between his business activities and the goals of the Farmer-to-Consumer Direct Marketing Act. Therefore, even if the Farmer-to-Consumer Direct Marketing Act exempted raisin producers from the mandates of the Raisin Order — which it does not — Mr. Home and partners failed to demonstrate compliance with the goals of the Farmer-to-Consumer Direct Marketing Act.

In their appeal, Mr. Home and partners question the constitutionally of the Raisin Order. First and foremost, I have no authority to judge the constitutionality of the various statutes administered by the United States Department of Agriculture.

Califano v. Sanders, 430 U.S. 99, 109 (1977) ("Constitutional questions obviously are unsuited to resolution in administrative hearing procedures"); *Robinson v. United States*, 718 F.2d 336, 338 (10th Cir. 1983) ("The agency is an inappropriate forum for determining whether its governing statute is constitutional"). Therefore, Mr. Home and partners questioning of the constitutionality of the Raisin Order falls on legally deaf ears. I need not point out to Mr. Horne and partners that the Court of Federal Claims recently found the arguments made in this appeal to be unavailing. *Evans v. United States*, 74 Fed. Cl. 554 (2006). The United States Court of Appeals for the Federal Circuit affirmed the Court of Federal Claims Decision, 250 F. App'x 231 (2007), and the Supreme Court of the United States denied a petition for certiorari, 128 S. Ct. 1292 (2008). Until the appropriate court instructs me otherwise, I will treat the Raisin Order as constitutional, as I believe it to be.[7]

The Raisin Order's provisions apply to "handlers" who "first handle" raisins. A "handler" is defined in the raisin marketing order to include "any processor or packer" (7 C.F.R. § 989.15). A "packer" is defined as "any person who, within the area, stems, sorts, cleans, or seeds raisins, grades stemmed raisins, or

---

[7] Mr. Home and partners suggest, at page 29 ¶ 102 of Respondents' Opening Brief On Appeal to Judicial Officer, USDA [hereinafter Respondents' Appeal Brief], that I might consider a "Rule 15(c)" proceeding the appropriate forum in which to address their constitutional argument. I need not address that question because, considering the results of the Evans case, conducting a "Rule 15(c)" proceeding would not alter the results.

packages raisins for market as raisins" (7 C.F.R. § 989.14). A handler becomes a "first handler" when he "acquires" raisins, a term specifically and plainly defined by the Raisin Order:

> **§ 989.17 Acquire.**
>
> *Acquire* means to have or obtain physical possession of raisins by a handler at his packing or processing plant or at any other established receiving station operated by him: . . . *Provided further*, That the term shall apply only to the handler who first acquires raisins.

7 C.F.R. § 989.17.

The record demonstrates that Mr. Home and partners, in their operation of the packing house known as Lassen Vineyards, came within each of these definitions during crop years 2002-2003 and 2003-2004. As such, they were required as a handler to: (1) cause an inspection and certification to be made of all natural condition raisins acquired or received (7 C.F.R. § 989.58(d)); (2) hold in storage all acquired reserve tonnage as established by the controlling reserve tonnage regulation (7 C.F.R. §§ 989.66, .166); (3) file certified reports showing: inventory, acquisition, and other information required by the RAC to enable it to perform its duties (7 C.F.R. § 989.73); (4) allow the RAC access to inspect the premises, the raisins held, and all records for the purposes of checking and verifying reports filed (7 C.F.R. § 989.77); and (5) pay assessments to the RAC with respect to free tonnage acquired and any reserve tonnage released or sold for use in free tonnage outlets (7 C.F.R. § 989.80).

Mr. Home and partners' arguments that they did not acquire raisins are unavailing in light of the plain meaning of the language of the Raisin Order defining the term "acquire." Moreover, if there were any ambiguity, the interpretation given by the United States Department of Agriculture both at the time of the issuance of the Raisin Order and in subsequent correspondence with the Homes, is clear, straightforward, of long-standing, and controlling. *See Barnhart v. Walton*, 535 U.S. 212 (2002); *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

The 1949 recommended decision, which was adopted as part of the Secretary of Agriculture's final decision, explained the language employed and clarified that:

> The term "acquire" should mean to obtain possession of raisins by the first handler thereof. The significance of the term "acquire" should be considered in light of the definition of "handler" (and related definitions of "packer" and "processor"), in that the regulatory features of the order would apply to any handler who acquires raisins. Regulation should take place at the point in the marketing channel where a handler first obtains possession of raisins, so that the regulatory provisions of the order concerning the handling of raisins would apply only once to the same raisins. Numerous ways by which handlers might acquire raisins were proposed for inclusion in the definition of the term, the objective being to make sure that all raisins coming within the scope of handlers' functions were covered and, conversely, to prevent a way being available

> whereby a portion of the raisins handled in the area would not be covered. Some of the ways by which a handler might obtain possession of raisins include: (i) Receiving them from producers, dehydrators, or others, whether by purchase, contract, or by arrangement for toll packing, or packing for a cash consideration[.]

14 Fed. Reg. 3083, 3086 (June 8, 1949).

This interpretation is consistent with testimony at the hearing conducted to consider the need of the raisin industry for a marketing order and its appropriate terms:

> Q Mr. Hoak, suppose a packer stems, cleans, and performs other operations connected with the processing of raisins for a producer and then the producer sells the raisins to another packer. Under this proposal, which person should be required to set the raisins aside?
>
> A The man who performs the packing operation, who is the packer.
>
> Q Mr. Hoak, I believe that you have testified earlier that the term "packer" should include a toll packer. By that do you mean that it should include a person who takes raisins for someone else for a fee?
>
> A That is right.
>
> Q Also, did I understand you to say that that person should be the one who would be required to set aside or establish the pools under the regulatory provisions?

> A That is right. He is the man who would be held responsible for setting aside the required amount of raisins.
>
> Q I take it that that man would not have title to any raisins insofar as he is a toll packer; is that correct?
>
> A That is right.

ALT Decision and Order, App. A.

These excerpts from the recommended decision and the hearing transcript were sent to an attorney representing Mr. and Mrs. Horne on April 23, 2001. Apparently, they believe their personal interpretation of the term "acquire" as used in the Raisin Order should take precedence over the plain language of the Raisin Order and the interpretation of its meaning that was conveyed to them by the United States Department of Agriculture. The decision of Mr. Horne and partners not to follow the United States Department of Agriculture's interpretative advice, and, instead, to play a kind of shell game with interlocking partnerships and a marketing association to try to conceal their role as first handler, only shows that they acted willfully and intentionally when they decided not to file accurate reports, not to hold raisins in reserve, not to have incoming raisins inspected, not to pay assessments, and not to allow inspection of their records for verification purposes.

In simple terms, Mr. Horne and partners, as a matter of law, acquired raisins, as first handlers, when raisins arrived at the processing/packing facility known as Lassen Vineyards. Their arguments that title to the raisins never transferred

from the grower to Mr. Home and partners under California law is unavailing. California law does not control, the Raisin Order does. Under the Raisin Order, the term "acquire" is a term of art that does not encompass an ownership interest but rather physical possession. Mr. Home and partners obtained physical possession of — thus they "acquired" — raisins when a grower brought raisins to the facility.

I also must address Mr. Home and partners' position that they did not process the raisins but merely leased equipment to producers who processed their own raisins. The argument defies common sense. Mr. Home and partners own raisin processing equipment. Growers bring raisins to the facility for processing. The grower pays Mr. Home and partners for use of the equipment not by the hour or day like most equipment leases but by the pound, i.e., the amount of product processed. That price includes supervision of the equipment by Mr. Home's son, whose salary is paid by the partnership. The price also includes other workers who are provided by a different, but interlocking, partnership consisting of two members of the Lassen Vineyards partnership, Mr. Home's wife and mother-in-law. In addition, the "lease" price also includes all packing material (on which Mr. Home's handler number has been imprinted). Furthermore, the grower "leasing" the equipment need not stay at the facility during the use of the equipment but can leave the location allowing Lassen Vineyards' employees to supervise the processing. Mr. Home and partners can call what they do a "lease" or anything else they might want to call it, but the reality is that Mr. Home and partners are processing/handling raisins.

Mr. Home and partners argue the ALJ erred by failing to use a higher standard of proof than preponderance of the evidence (Respondents' Appeal Brief at 32-35). Reviewing their earlier filings before the ALJ, I found no suggestion to the ALJ that a higher standard of proof should be utilized. Absent such a suggestion to the ALJ, I am reluctant to reverse the ALJ's use of the preponderance of the evidence standard. However, to satisfy myself that the appropriate standard was applied, I reviewed the argument. I found the argument significantly lacking. While there are proceedings in which a greater standard is appropriate,[8] this proceeding is not one of them. Mr. Home and partners did not demonstrate that a standard of proof higher than the preponderance of the evidence standard was appropriate. Therefore, I hold that the ALJ's use of the preponderance of the evidence standard was not error.

Mr. Home and partners also argue the Administrator failed to meet his burden to prove the case by a preponderance of the evidence.[9] I disagree.

---

[8] See, e.g., *Santosky v. Kramer*, 455 U.S. 745 (1982) (proceeding to terminate parental rights); *Addington v. Texas*, 441 U.S. 418 (1979) (involuntary commitment proceeding); *Woodby v. INS*, 385 U.S. 276 (1966) (deportation).

[9] Preponderance of evidence. Evidence which is of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not [citation omitted]. With respect to burden of proof in civil actions, means greater weight of evidence, or evidence which is more credible and convincing to the mind. That which best accords with reason and probability.

I do not provide a laundry list of "fact[s] sought to be proved," but I note that I read the entire transcript and examined the evidence. The greater weight of that evidence leaves me with but one conclusion which is that Marvin Home and partners put in place a scheme to enhance their profitability by avoiding the requirements of the Raisin Order. By so doing, they obtained an unfair competitive advantage over everyone in the raisin industry who complied with the Raisin Order.

The Administrator alleges that Mr. Home and partners violated section 989.77 of the Raisin Order (7 C.F.R. § 989.77) "by failing to allow access to their records to the U.S. Department of Agriculture, even after being served with two subpoenas for such access." (Second Amended Compl. at 5 ¶ 12.) Mr. Home and partners deny this allegation stating "[t]here was no evidence of noncompliance with subpoenas, information requests, or failure to fully comply with Government requests for data." (Respondents' Appeal Brief at 30 ¶ 104.) The record belies that claim showing that Mr. Home failed to allow access as required by section 989.77 of the Raisin Order (7 C.F.R. § 989.77).

The Raisin Order makes clear that handlers shall provide access to their facilities and records, as follows:

> **§ 989.77 Verification of reports and records.**
>
> For the purpose of checking and verifying reports filed by handlers and records prescribed in or

---

Black's Law Dictionary 1064 (5th ed. 1979).

> pursuant to this amended subpart, the committee, through its duly authorized representatives, shall have access to any handler's premises during regular business hours and shall be permitted at any such times to inspect such premises and any raisins held by such handler, and any and all records of the handler with respect to the holding or disposition of raisins by him and promotion and advertising activities conducted by handlers under § 989.53.

7 C.F.R. § 989.77.

On August 29, 2001, Maria Martinez Esguerra, a compliance officer for the Agricultural Marketing Service in the Fresno, California, office, was assigned to investigate whether Mr. Horne was packing and shipping raisins without obtaining inspections (Tr. I at 420). During the course of her investigation, Ms. Esguerra met with Mr. Horne and asked to review his raisin production, acquisition, sales, and disposition records (Tr. 1 at 421). Mr. Horne told Ms. Esguerra "that he would not release any information without a subpoena." (Tr. I at 421.)

Ms. Esguerra's testimony continued:

> On May 14 I had prepared a subpoena, a request for a subpoena for the administrator. But my declaration here also stated basically in my conversation or interview with Mr. Horne to which he had admitted to me that he produced and packed organic raisins during the crop years 2000 and 2001.
>
> There were other questions that I had asked, and I'd asked him about if he had packed organic raisins in cellophane bags and he said he did. In

> fact he even showed us the sizes of those cello packaged raisins.
>
> They were in sizes 16 ounces, 8 ounce and 1.5 ounces. However, he disclosed to, he did - he refused to disclose any more information regarding his sales.
>
> He has raisin production and acquisition records, and sales and dispositions, but again he said he would not release any information without a subpoena.
>
> Following that we had a subpoena prepared, and on November 26 I receive that, and I subsequently served it to Mr. Home on that same day.
>
> On December 9, I went back to the house of Marvin Horne on Modoc Avenue pursuant to that subpoena, and I asked if I could speak with him and he met me at the door. He told me why he will not produce any records for me to review.

Tr. I at 421-23. Ms. Esguerra was asked: "After you served Mr. Horne with the subpoena, did he produce any records?" She responded: "No, he did not." (Tr. I at 423-24.)

Ms. Esguerra's testimony demonstrates that she sought access to Mr. Home and partners' records which she is authorized to do under the Raisin Order. Mr. Home refused unless Ms. Esguerra obtained a subpoena. Even though a subpoena is not required under the Raisin Order, Ms. Esguerra obtained one (CX 154). When she presented the subpoena to Mr. Horn; he still refused to comply with the Raisin Order and give her access to the records. Therefore, I conclude Mr. Home and partners

violated section 989.77 of the Raisin Order (7 C.F.R. § 989.77) by refusing to provide Ms. Esguerra access to their records.

There are three components of the Order in this Decision and Order that mandate Mr. Horne and partners make monetary payments as a result of their violations of the Raisin Order. First, the Raisin Order requires a handler, who fails to deliver reserve tonnage, to compensate the RAC, as follows:

> **§ 989.166 Reserve tonnage generally.**
>
> . . . .
>
> (c) *Remedy in the event of failure to deliver reserve tonnage raisins.* A handler who fails to deliver to the Committee, upon request, any reserve tonnage raisins in the quantity and quality for which he has become obligated ... shall compensate the Committee for the amount of the loss resulting from his failure to so deliver.

7 C.F.R. § 989.166(c). This provision of the Raisin Order leaves me no discretion on the matter and requires that I order Mr. Home and partners to compensate the RAC for the reserve tonnage raisins they failed to deliver to the RAC. The Raisin Order also instructs me as to how to calculate the compensation owed by Mr. Home and partners to the RAC.

> **§ 989.166 Reserve tonnage generally.**
>
> . . . .
>
> (c) Remedy in the event of failure to deliver reserve tonnage raisins. . . . The amount of compensation for any shortage of tonnage shall be determined by multiplying the quantity of reserve raisins not delivered by the latest weighted

> average price per ton received by producers during the particular crop year for free tonnage raisins of the same varietal type or types.

7 C.F.R. § 989.166(c).

For the 2002-2003 crop year, Mr. Home and partners packed out 98,550 pounds of raisins (CX 82-CX 87). Applying the shrinkage factor (CX 92 at 6) for weight loss during processing, Mr. Home and partners received 105,000 pounds of raisins in the 2002-2003 crop year. The reserve obligation for the 2002-2003 crop year was 47 percent (CX 88 at 2). Mr. Home and partners' reserve obligation for that crop year was 49,350 pounds (.47 x 105,000 = 49,350). The producer price for raisins was $394.85 per ton (CX 161 at 3). Therefore, for the 2002-2003 crop year, Mr. Horne and partners owe $9,742.93 to the RAC for compensation for failing to deliver any reserve raisins to RAC (49,350 pounds divided by 2000 pounds per ton = 24.675 tons; 24.675 tons x $394.85 per ton equals $9,742.93).

Similarly, for the 2003-2004 crop year, Mr. Horne and partners packed out 1,965,650 pounds of raisins (CX 3-CX 56). These raisins included natural seedless raisins and other varieties. Applying the 2003-2004 shrinkage factor for each variety indicates that Mr. Home and partners received 2,066,066 pounds of raisins in the 2003-2004 crop year. Of the 2,066,066 pounds of raisins received, 2,037,196 pounds were natural seedless raisins subject to the 30 percent reserve obligation (CX 161). Mr. Horne and partners' reserve obligation for the 2003-2004 crop year was 611,159 pounds (.30 x 2,037,196 = 611,158.8). The producer price for raisins was $567 per ton (71 Fed. Reg. 29,565, 29,569 (May 23,

2006)).[10] Therefore, for the 2003-2004 crop year, Mr. Home and partners owe $173,263.58 to the RAC for compensation for failing to deliver any reserve raisins to the RAC (611,159 pounds divided by 2000 pounds per ton = 305.5795 tons; 305.5795 tons x $567 per ton equals $173,263.58).

The Raisin Order requires that each handler contribute to the costs associated with operating the RAC, as follows:

> **§ 989.80 Assessments.**
>
> (a) Each handler shall, with respect to free tonnage acquired by him, . . . pay to the committee, upon demand, his pro rata share of the expenses . . . which the Secretary finds will be incurred, as aforesaid, by the committee during each crop year. . . . Such handler's pro rata share of such expenses shall be equal to the ratio between the total free tonnage acquired by such handler . . . during the applicable crop year and

---

[10] The Agricultural Marketing Service calculated the 2003-2004 reserve obligation compensation using a producer price of $810 per ton. The record citation for this producer price is CX 93, the RAC marketing policy for the 2003-2004 crop year. The RAC marketing policy for the 2003-2004 crop year mentions a "probable price" at $810 per ton (CX 93 at 4). However, the interim final rule setting the Final Free and Reserve Percentages for the 2005-2006 crop year identifies the producer prices for the 2003-2004 crop year as $567 (71 Fed. Reg. 29,565, 29,569 (May 23, 2006)). The Administrator's Brief in Opposition to Respondents' Appeal of the ALJ's Decision and Order was filed well after the date the producer prices were published in the Federal Register. The Administrator had an obligation to notify me that the original calculations were erroneous.

> the total free tonnage acquired by all handlers . . . during the same crop year.

7 C.F.R. 989.80(a). The assessment rate was established at $8 per ton (CX 90).

As noted in this Decision and Order, *supra*, for the 2002-2003 crop year, Mr. Home and partners received 105,000 pounds of raisins. The reserve obligation for the 2002-2003 crop year was 47 percent, therefore, the free tonnage was 53 percent (CX 88 at 2). Mr. Home and partners' free tonnage for that crop year was 55,650 pounds (.53 x 105,000 = 55,650). Mr. Home and partners' assessment obligation for the 2002-2003 crop year is $222.60 (55,650 pounds divided by 2000 pounds per ton = 27.825 tons; 27.825 tons x $8 per ton = $222.60).

The calculation of the assessment for the 2003-2004 crop year is complicated by the multiple varieties processed during that year, including varieties without reserve requirements. Mr. Home and partners received 2,066,066 pounds of raisins in the 2003-2004 crop year. Of the 2,066,066 pounds of raisins received, 2,037,196 pounds were natural seedless raisins subject to the 30 percent reserve obligation (CX 161). The free tonnage of natural seedless raisins was 1,426,037.2 pounds (.70 x 2,037,196 = 1,426,037.2). In addition, there were 28,870 pounds of other varieties which were all free tonnage (2,066,066 - 2,037,196 = 28,870). Thus, the total free tonnage for the 2003-2004 crop year was 1,454,907.2 pounds. At an assessment rate of $8 per ton, Mr. Horne and partners' assessment obligation for the 2003-2004 crop year is $5,819.63 (1,454,037.2 pounds divided by 2000 pounds per ton = 727.4536 tons; 727.4536 tons x $8 per ton -- $5,819.63). The

total assessment due to the RAC by Mr. Hom partners for both crop years is $6,042.23.[11]

I find it necessary to briefly note that, althou Raisin Order requires payment of the asses "upon demand" and the record contains no evi of such demand for the 2002-2003 crop yea decision ordering payment is appropriate. I co Mr. Horne and partners' failure to file accurate with the RAC noting the volume of raisins pro incapacitated the RAC ability to make the de for payment of the assessment. The RAC 199 Analysis Report states:

The documentation of deliveries, on an indi grower basis, establishes the database on whic other functions are based. This include accountability of all raisin deliveries, respons of packers' administrative assessments, pa reserve pool obligations and the basis upon whi RAC staff distributes reserve pool equity grower.

RX 70 at 8. Without the information to dete the amounts of payment, the RAC could not de the payment. Now that I have calculate amount of the administrative assessment reserve pool obligations, those amounts are d payable.

---

[11] The Administrator, as the party seeking enforcemen Raisin Order, should have provided a better road calculate both the assessment and compensation for fa deliver any reserve raisins to the RAC. The Admin should have provided a specific formula for determin money owed as well as a record cite where each number in the calculation of the money owed could be located.

The AMAA authorizes civil penalties for violations of marketing orders, such as the Raisin Order, issued under the AMAA.

§ 608c. Orders

. . . .

(14) Violation of order

. . . .

(B) Any handler subject to an order issued under this section, or any officer, director, agent, or employee of such handler, who violates any provision of such order may be assessed a civil penalty by the Secretary not exceeding $1,000 for each such violation. Each day during which such violation continues shall be deemed a separate violation. . . . The Secretary may issue an order assessing a civil penalty under this paragraph only after notice and an opportunity for an agency hearing on the record. Such order shall be treated as a final order reviewable in the district courts of the United States in any district in which the handler subject to the order is an inhabitant, or has the handler's principal place of business. The validity of such order may not be reviewed in an action to collect such civil penalty.

7 U.S.C. § 608c(14)(B) (Supp. V 2005).[12]

---

[12] Pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended (28 U.S.C. § 2461 note), the Secretary of Agriculture, by regulation, adjusted the civil monetary penalty that may be assessed under the AMAA (7 U.S.C. § 608c(14)(B)) for each violation of a marketing order,

In determining the amount of the civil penalty for violations of the Raisin Order, certain factors should be considered including:

> nature of the violations, the number of violations, the damage or potential damage to the regulatory program from the type of violations involved here, the amount of profit potentially available to a handler who commits such violations, prior warnings or instructions given to [the violator], and any other circumstances shedding light on the degree of culpability involved.

In re Onofrio Calabrese, 51 Agric. Dec. 131, 154-55 (1992), *aff'd sub nom. Balice v. USDA*, No. CV–F-92-5483–GEB (E.D. Cal. July 14, 1998), *printed in* 57 Agric. Dec. 841 (1998), *aff'd*, 203 F.3d 684 (9th Cir. 2000), *reprinted in* 59 Agric. Dec. 1 (2000).

I have reviewed the recommendation of the Administrator regarding a civil penalty. I have examined the factors to be considered for determining the amount of the civil penalty. I examined the actions of Mr. Horne and partners as these actions relate to the factors, including an examination of their tax returns (RX 13) to determine the impact of the violations on the revenue generated by the partners. I find that intentional violations of the Raisin Order's requirements that a handler shall pay assessments, have inspections performed, hold a percentage of the raisins handled in reserve, and file specified reports are serious violations of both the AMAA and the Raisin Order. Furthermore, I find the violations by

---

by increasing the maximum civil penalty from $1,000 to $1,100 (7 C.F.R. § 3.91(b)(vii) (2005)).

Mr. Home and partners significantly increased the revenue generated by the partnership (RX 13). Therefore, I conclude a significant civil penalty is warranted to deter Mr. Home and partners, as well as other handlers, from committing similar violations in the future.

As discussed in this Decision and Order, *supra*, I have found that Mr. Home and partners committed the following violations:

1. Twenty violations of section 989.73 of the Raisin Order (7 C.F.R. § 989.73) by filing inaccurate reporting forms to the RAC on 20 occasions.

2. Fifty-eight violations of section 989.58(d) of the Raisin Order (7 C.F.R. § 989.58(d)) by failing to obtain incoming inspections of raisins on 58 occasions.

3. Two violations of section 989.80 of the Raisin Order (7 C.F.R. § 989.80) by failing to pay assessments to the RAC in crop year 2002-2003 and crop year 2003-2004.

4. Five hundred ninety-two violations of sections 989.66 and 989.166 of the Raisin Order (7 C.F.R. §§ 989.66, .166) by failing to hold raisins in reserve and by failing to pay the RAC the dollar equivalent of the raisins not held in reserve.

5. One violation of section 989.77 of the Raisin Order (7 C.F.R. § 989.77) by failing to allow the Agricultural Marketing Service to have access to their records.

The appropriate civil penalties for these violations are: (1) $300 per violation for filing inaccurate reporting forms, in violation of 7 C.F.R. § 989.73, for a total of $6,000; (2) $300 per violation for the failure to obtain incoming inspections, in violation of 7 C.F.R. § 989.58(d), for a total of $17,400; (3) $1,000 for the failure to allow access to records, in violation of 7 C.F.R. § 989.77; (4) $300 per violation for the failure to pay the assessments, in violation of 7 C.F.R. § 989.80, for a total of $600; and (5) $300 per violation for the failure to hold raisins in reserve, in violation of 7 C.F.R. §§ 989.66, .166, for a total of $177, 600. The total civil penalties assessed against Mr. Home and partners for violating the Raisin Order in the 2002-2003 and 2003-2004 crop years is $202,600. I conclude that civil penalties in these amounts are sufficient to deter Mr. Home and partners from continuing to violate the Raisin Order and will deter others from similar future violations.

For the foregoing reasons, the following Order is issued.

ORDER

Marvin D. Home, Laura R. Home, Don Durbahn, Lassen Vineyards, a partnership, and Raisin Valley Farms, a partnership, jointly and severally, are assessed a $202,600 civil penalty. The civil penalty shall be paid by certified check or money order made payable to the "Treasurer of the United States" and sent to:

Frank Martin, Jr.
United States Department of
Agriculture
Office of the General Counsel
Marketing Division
Room 2343-South Building
Washington, DC 20250-1417

Payment of the civil penalty shall be sent to Mr. Martin within 100 days after this Order becomes effective.

Marvin D. Home, Laura R. Horne, Don Durbahn, Lassen Vineyards, a partnership, and Raisin Valley Farms, a partnership, jointly and severally, are ordered to pay to the RAC $6,042.23 in assessments for crop years 2002-2003 and 2003-2004, and $183,006.51 for the dollar equivalent of the California raisins they failed to hold in reserve for crop years 2002-2003 and 2003-2004. Payments of the $6,042.23 for owed assessments and of the $183,006.51 for the dollar equivalent of the California raisins that were not held in reserve shall be sent to the RAC within 100 days after this Order becomes effective.

This Order shall become effective on the day after service on Marvin D. Home, Laura R. Home, Don Durbahn, Lassen Vineyards, a partnership, and Raisin Valley Farms, a partnership.

RIGHT TO JUDICIAL REVIEW

Marvin D. Home, Laura R. Home, Don Durbahn, Lassen Vineyards, a partnership, and Raisin Valley Farms, a partnership, have the right to obtain review of the Order in this Decision and Order in any district court of the United States in which they are inhabitants or have their principal place of business.[13]

Done at Washington, DC

April 11, 2008

William G. Jenson
Judicial Officer

---

[13] 7 U.S.C. § 608c(14)(B).

APPENDIX H

UNITED STATES DEPARTMENT OF AGRICULTURE

BEFORE THE SECRETARY OF AGRICULTURE

In re:	)	AMAA
	)	Docket No.
Marvin D. Horne and	)	04-0002
Laura R. Horne, d/b/a	)	
Raisin Valley Farms, a partnership	)	
and d/b/a Raisin Valley	)	
Farms Marketing Association,	)	
also known as	)	
Raisin Valley Marketing, an	)	
unincorporated association	)	
	)	
And	)	
	)	
Marvin D. Horne,	)	
Laura R. Horne,	)	
Don Durbahn, and	)	
The Estate of Rena Durbahn, d/b/a	)	
Lassen Vineyards, a partnership,	)	
	)	
Respondents	)	

Decision and Order

This is a disciplinary proceeding under the Agricultural Marketing Agreement Act of 1937, (AMAA), as amended, 7 U.S.C. § 601 *et seq.* It was instituted by the United States Department of Agriculture's Administrator of the Agricultural Marketing Service (AMS) who alleged that respondents did not comply with the provisions of the federal marketing order and the implementing regulation that applied for crop years 2002-2003 and 2003-2004 to first handlers of raisins produced from grapes grown in California (7 C.F.R. §§ 989.1-989.95 (Raisin Order), and 7 C.F.R. § 989.166 (Reserve tonnage regulation)). Under the Raisin Order and the Reserve tonnage regulation, first handlers are required to: (1) obtain inspections of raisins acquired or received (7 C.F.R. § 989.58(d)); (2) hold acquired raisins designated as reserve tonnage for the account of the Raisin Administrative Committee (RAC) (7 C.F.R. § 66 and 7 C.F.R. § 989.166); (3) file accurate reports with the RAC (7 C.F.R. § 73); (4) allow access to their records to verify their accuracy (7 C.F.R. § 989.77); and (5) pay assessments to the RAC (7 C.F.R. § 989.80). Respondents dispute that they are handlers in that they never obtained any raisins through purchase or transfer of ownership to any of the business entities that they operate and argue, therefore, they did not acquire raisins within the meaning of the Raisin Order. Respondents further argue that they are not subject to the requirements of the Raisin Order because they are farmers/producers who have acted in good faith to advance the stated policy of the Farmer-to-Consumer Direct Marketing Act of 1976, 7 U.S.C. §§ 3001-3006.

I held oral hearings in Fresno, California at which transcribed testimony was taken and exhibits were

received (February 9-11, 2005 (Tr. I); May 23, 2006 (Tr. II)). AMS was represented at the first hearing by Frank Martin, Jr., Esq. who was joined at the second hearing by Babak A. Rastgoufard, Esq. Both are attorneys with the Office of the General Counsel, United States Department of Agriculture. Respondents were represented by David Domina, Esq. and Michael Stumo, Esq. Complainant and respondents simultaneously filed their second post-hearing proposed findings, conclusions and supporting briefs on November 1, 2006.

Upon consideration of the record evidence, review of the provisions of the controlling Raisin Order, regulations and applicable and cited statutes, as well as the arguments of the parties, I have found and concluded that respondents Marvin D. Horne, Laura R. Home, Don Durbahn and Reba Durbahn, now deceased, acting together as partners doing business as Lassen Vineyards, at all times material herein, acted as a first handler of raisins subject to the inspection, assessment, reporting, verification and reserve requirements of the Raisin Order and the Reserve tonnage regulation. I further find that these respondents violated the AMAA and the Raisin Order by failing to obtain inspections of acquired incoming raisins; failing to hold requisite tonnages of raisins in reserve; failing to file accurate reports; failing to allow access to their records; and failing to pay requisite assessments. I have concluded that the Farmer-to-Consumer Direct Marketing Act of 1976 has not exempted farmers/producers who act as handlers from being subject to regulation by federal marketing orders. I have further concluded that the violations by Marvin D. Home, Laura R. Home and Don Durbahn, on behalf of and doing business as

Lassen Vineyards, require the entry of an order directing them to pay the RAC assessments they have failed to pay, and to pay the RAC the dollar equivalent of the raisins they failed to hold in reserve. Moreover, I have concluded that their violations were deliberate and were designed to obtain an unfair competitive advantage over other California raisin handlers who were in compliance with the Raisin Order, and a civil penalty should therefore be assessed against them (excluding Rena Durbahn, now deceased) pursuant to 7 U.S.C. § 608c(14)(B), in the amount of $731,500.

Findings of Fact

1. Marvin D. Home is a farmer who has farmed since 1969, growing Thompson seedless grapes for raisins. He does business with his wife Laura R. Home as "Raisin Valley Farms" which is a registered trademark for their grape growing and raisin producing activities that are the largest in the California valley where most of the world's raisins are produced (Tr. I, at 868-869). Marvin D. Home and Laura R. Home also do business as Raisin Valley Farms Marketing Association (also known as Raisin Valley Marketing). Both Raisin Valley Farms and Raisin Valley Farms Marketing Association have the same business mailing address: 3678 North Modoc, Kerman, California 93630 (Tr. I, at 873).

2. During the 2002-2003 and 2003-2004 crop years, Marvin D. Home and Laura R. Home also operated a general partnership with Laura's father, Don Durbahn, and Laura's mother, Rena Durbahn (now deceased). This partnership did business and continues to do business as Lassen Vineyards at

2267 North Lassen, Kerman, California 93630. Prior to 2002, Lassen Vineyards was exclusively a farming partnership that produced Thompson seedless grapes made into raisins (Tr. I, at 870). In 2001, the partnership ordered packing plant equipment that it commenced to use in 2002 (Tr. I, at 871-873).

3. Marvin D, Horne was a member or alternate member of the RAC for six years (Tr. I, at 175). As early as 1998, Marvin D. Home and Laura R. Home indicated to the RAC their interest in acting as a handler of California raisins under the Raisin Order (CX 94). In crop years 2001-2002, 2002-2003, and 2003-2004, Mr. and Mrs. Home's partnership, Raisin Valley Farms, filed notifications with the RAC of intentions to handle raisins as a packer under the Raisin Order (CX-98, CX-100 and CX-102).

4. Mr. Home has both met and corresponded with representatives of the United States Department of Agriculture who have advised him concerning his responsibilities as a handler under the Raisin Order (CX-94, RX-100-103, RX 113, Tr. I, at 169-171).

5. On March 15, 2001, Marvin D. Home and Laura R. Home, acting as Raisin Valley Farms, through their then attorney, wrote to the Secretary of Agriculture and asked whether the obligations of the federal raisin marketing order regarding volume regulation, quality control, payment of assessments to the Raisin Administrative Committee and reporting requirements would apply if Raisin Valley Farms had its raisins "custom packed" by the Del Rey Packing Company, a packer that would not take title to Raisin Valley Farms' raisins. On April 23, 2001, the Deputy Administrator, Fruit and Vegetable Programs, United States Department of Agriculture,

replied on behalf of the Secretary (RX 98 (Appendix A); and Tr. II, at 957-960). The Deputy Administrator explained that under such circumstances, Raisin Valley Farms would be neither a packer nor a handler, but that Del Rey would be both. This type of arrangement, in which the grower retains title and has his raisins packed for a fee is, the Deputy Administrator explained, comparable to "toll packing", a form of raisin acquisition by a handler that was recognized as such by the promulgation record underlying the Raisin Marketing Order. He further explained that under section 989.17 of the Raisin Order, 7 C.F.R. § 989.17, once an entity has or obtains physical possession of raisins at a packing or processing plant, it has "acquired" raisins within the meaning of the section, and thus Del Rey would:

> ...be required to meet the order's obligations regarding volume regulation, quality control, payment of assessments to the Raisin Administrative Committee (RAC), and reporting requirements.

(RX 98 (Appendix A), at 1).

The Deputy Administrator enclosed portions of the 1949 Recommended Decision and hearing testimony relevant to the question that showed it had been expressly considered and discussed in the hearing record and in the Secretary's stated rationale for promulgating the Raisin Order. (These enclosures are part of RX 98, attached to this Decision and Order as Appendix A).

6. On April 23, 2002, Mr. and Mrs. Home notified the Secretary of Agriculture that they were

registering as a handler under the Raisin Order under protest, but agreed to comply with its volume control (reserve) provisions (CX-101).

7. Marvin D. Home was also specifically advised, on May 20, 2002, by the Administrator of Marketing and Regulatory Programs, AMS, in response to an e-mail and a letter Mr. Home had sent to the Secretary of Agriculture, that if he packed and handled his own raisins:

> Such activities would make you a handler under the order. As a handler, you would be required to meet all of the order's regulations regarding volume control, quality control (incoming and outgoing inspection), assessments, and reporting to the RAC.
>
> (RX 101, attached to this Decision and Order as Appendix B).

8. The Departmental interpretations of the terms of the Raisin Order that Marvin D. Home requested and received were expressly disregarded. Though he did not have Del Rey custom pack his raisins, Mr. Home elected to set up a family-owned toll packing operation at Lassen Vineyards and pack raisins for his family, and for growers for a fee (Tr. I, at 977). Contrary to the interpretive advice Marvin D. Home had received from USDA, Lassen Vineyards did not pay any assessments, did not have any incoming inspections performed, did not file any reports, and did not hold any raisins in reserve in respect to any of the raisins Lassen Vineyards received from and packed for growers during the 2002-2003 and 2003-2004 crop years (Tr. I, at 965-973).

9. Lassen Vineyards, a general partnership operated by Marvin D. Home, together with his partners, Laura R. Home, Don Durbahn, and the late Rena Durbahn, owned land at 2267 N. Lassen, Kerman, California 93630, where they owned and operated equipment and a raisin packing plant that they used, in the crop years 2002-2003 and 2003-2004, to stem, sort, clean, grade and package California raisins for themselves and, for a fee, for others (Tr. II, at 25-27, and 962). The only difference Mr. Home could state between the way packing was conducted at Lassen Vineyards and by a toll packer charging a fee for sorting, cleaning and packing raisins in boxes was that the packed product could leave Lassen Vineyards without the farmer being required to pay fees up front (Tr. I, at 979).

10. During crop years 2002-2003 and 2003-2004, Lassen Vineyards charged producers a 12 cent per pound fee to pack raisins and five dollars for the use of each pallet upon which the boxed raisins were stacked (Tr. II, at 28 and 44). The cost for labor and packaging materials was included in the fee charged (Tr. II, at 30-31, 44, and 48). Some raisin producers were given discounts from these fees for services they performed or the volumes of raisins they had packed at the plant (Tr. II, at 39-43). The packing activities at Lassen Vineyards were supervised by Don Durbahn and by Marvin A. Home, Mr. and Mrs. Marvin D. Home's son (Tr. I, at 879-880). The workers who performed the packing activities at Lassen Vineyards were "leased employees" who were leased by Laura R. Home and Rena Durbahn for Lassen Vineyards (Tr. I, at 933-934). All of the raisins packed by Lassen Vineyards in crop years 2002-2003 and 2003-2004, were packaged in boxes

stamped with the handler number 94-101 that had been assigned to Marvin D. Home and Laura R. Home (Tr. I, at 964-965).

11. During crop years 2002-2003 and 2003-2004, Mr. and Mrs. Home also conducted business as a not-for-profit unincorporated grower association named Raisin Valley Farms Marketing Association (also known as Raisin Valley Marketing). It was formed by Mr. and Mrs. Home to "attract the market of buyers" and allow them and other raisin growers to market their raisins together under the Homes' protected trade name "Raisin Valley Farms" (Tr. II, at 874-878). Sixty raisin growers were members of Raisin Valley Farms Marketing Association (Tr. II, at 55). Mr. Home conducted the marketing activities of Raisin Valley Farms Marketing Association and sold the packaged raisins either himself or through brokers (Tr. II, at 38 and 49). When the sale of the packaged raisin was negotiated through a broker, the grower whose raisins were sold had the brokerage fee and the fee for the packing performed by Lassen Vineyards deducted from his payment check (Tr. II, at 50-51). When the sale was made without an outside broker, the grower's payment check was reduced by the fee for the packing services performed by Lassen Vineyards and by charges by the Association in the form of an accounting fee and for a fund to protect members from customers who fail to pay (Tr. II, at 51-52). Mr. Home acknowledged that Lassen Vineyards benefited under these arrangements from the fees that it received from growers for "the rental of its equipment" (Tr. II, at 52).

12. When Mr. Home or a broker found a buyer who desired raisins, Mr. Home contacted one of Raisin Valley Farms Marketing Association's members on a rotational basis (that included the Raisin Valley Farms and the growing operations of Lassen Vineyards) and asked them to bring their raisins to Lassen Vineyard's packing plant to be stemmed, sorted, cleaned, graded and packaged (Tr. II, at 55-57). After the raisins were packed, the buyer's trucks picked them up, left a bill of lading and when the buyer paid, the money went into an Association bank account, out of which the grower was paid less deductions for brokerage, if any, and the packing fees owed and paid to Lassen Vineyards (Tr. IT, at 58-60).

13. On or about August 3, 2002, the respondents[1] submitted an inaccurate RAC-1 Form, Weekly Report of Standard Raisin Acquisitions, to the Raisin Administrative Committee (RAC). The respondents reported to the RAC that they did not acquire any California raisins during this time period. However, the record evidence shows that they acquired substantial amounts of California raisins during this time period (CX-1-2, CX-62, CX-82-87, CX-171-582, Tr. I, at 76-79 and 188-190).

14. From August 1, 2003 to November 30, 2003, the respondents submitted 13 inaccurate RAC-1 Forms Weekly Report of Standard Raisin Acquisitions, to the Raisin Administrative Committee (RAC). The respondents reported to the

---

[1] As hereinafter used in the Decision and Order, "the respondents" refers to Marvin D. Horn; Laura R. Horne, Rena A. Durbahn and Don Durbahn acting on behalf of or doing business as Lassen Vineyards.

RAC that they did not acquire any California raisins during this time period. However, the record evidence shows that they acquired substantial amounts of California raisins during this time period (CX-3-56, CX-63-75, CX-171-582, Tr. I, at 80-101).

15. From August 1, 2003 to November 30, 2003, the respondents submitted four inaccurate RAC-20 Forms, Monthly Reports of Free Tonnage Raisin Disposition, to the RAC. The respondents reported to the RAC that they did not ship or dispose of any California raisins during this time period. However, the record evidence shows that the respondents shipped substantial amounts of California raisins during this time period (CX-3-56, CX-76-79, CX-171-582, Tr. I, at 80-101).

16. During crop year 2002-2003, the respondents submitted an inaccurate RAC-50 Form, Inventory of Free Tonnage Standard Quality Raisins on Hand, to the RAC. The respondents reported to the RAC that they did not have any California raisin inventories during this time period. However, the record evidence shows that they had inventories of California raisins in that they were shipping substantial amounts of California raisins during this time period (CX-1-2, CX-80, CX-82-87, CX-171-582, Tr. I, at 76-79).

17. During crop year 2002-2003, the respondents submitted an inaccurate RAC-51 Form, Inventory of Off-Grade Raisins on Hand, to the RAC. The respondents reported to the RAC that they did not have any California raisin inventories during this time period. However, the record evidence shows that they had inventories of California raisins in that they were shipping substantial amounts of California

raisins during this time period (CX-1-2, CX-81-87, Tr. I, at 76-79).

18. During crop year 2002-2003, the respondents failed to obtain incoming inspections on approximately 1,504,020 pounds of California raisins (CX-170-582, Tr. I, at 76-79).

19. During crop year 2003-2004, the respondents failed to obtain incoming inspection on fifty-two occasions for approximately 2,066,066 pounds of California raisins (CX-3-54, CX-56, Tr. I, at 90, 97-99 and 967-970).

20. During crop year 2002-2003, the respondents failed to hold in reserve for 294 days approximately 369.8 tons of California Natural Sun-dried Seedless raisins (CX-1, CX-2, CX-171-582, Tr. I, at 176-179, 965 and 973). During crop year 2002-2003, the free tonnage price (field price) for California raisins was $745.00 a ton (CX-583). The respondents failed to pay $275, 501, to the RAC for California raisins they failed to hold in reserve for crop year 2002-2003 (CX-161, CX-171-582, Tr. I, at 972-973). The RAC issued two demand letters to the respondents to deliver reserve California raisins or to pay the dollar equivalent (RX-136-137).

21. During crop year 2003-2004, the respondents failed to hold in reserve for 298 days approximately 305.6 tons of California Natural Sun-Dried Seedless raisins (CX-3-54, CX-89, Tr. I, at 90 and 222-225). During crop year 2003-2004, the free tonnage price (field price) for California raisins was $810 a ton (CX-93, CX-583, Tr. I, at 225). The respondents failed to pay $247,536.00, to the RAC for California raisins they failed to hold in reserve for crop year

2003-2004 (CX-89, Tr. I, at 225 and 972-973). The RAC issued two demand letters to the respondents to deliver reserve California raisins or to pay the dollar equivalent (RX-136-137).

22. During crop year 2002-2003, the respondents failed to pay assessments to the RAC of approximately $3,438.10 (CX-1-2, CX-171-582, Tr. I, at 76-79 and 217- 222).

23. During crop year 2003-2004, the respondents failed to pay assessments to the RAC of approximately $5,951.63 (CX-3-54, Tr. I, at 90, 222-226, and 972-973).

24. The respondents failed to allow access to their records to the U.S. Department of Agriculture, even after being served with two subpoenas for such access (CX-153, CX-154, CX-164, RX-106, Tr. I, at 422-432 and 946-947).

Conclusions of Law

The Secretary of Agriculture has jurisdiction in this matter.

1. On August 3, 2002, the respondents violated section 989.73(b) of the Raisin Order (7 C.F.R. § 989.73(b)), by submitting an inaccurate RAC-1 Form, Weekly Report of Standard Raisin Acquisitions, to the Raisin Administrative Committee (RAC).

2. From August 1, 2003 to November 30, 2003, the respondents violated section 989.73(b) of the Raisin Order (7 C.F.R. §989.73(b)0, by submitting thirteen inaccurate RAC-1 Forms, Weekly Reports of Standard Raisin Acquisitions, to the RAC.

3. From August 1, 2003 to November 30, 2003, the respondents violated section 989.73(d) of the Raisin Order (7 C.F.R. §989.73(d)), by submitting four inaccurate RAC-20 Forms, Monthly Reports of Free Tonnage Raisin Disposition, to the RAC.

4. The respondents violated section 989.73(a) of the Raisin Order (7 C.F.R. §989.73(a)), by filing an inaccurate RAC-50 Form, Inventory of Free Tonnage Standard Quality Raisins on Hand, to the RAC for crop year 2002-2003.

5. The respondents violated section 989.73(a) of the Raisin Order (7 C.F.R. §989.73(a)), by filing an inaccurate RAC-51 Form, Inventory of Off-Grade Raisins on Hand, to the RAC for crop year 2002-2003.

6. The respondents violated section 989.58(d) of the Raisin Order (7 C.F.R. §989.58(d)), by failing to obtain incoming inspections for approximately 1,504,020 pounds of California raisins for crop year 2002-2003.

7. The respondents violated section 989.58(d) of the Raisin Order (7 C.F.R. §989.58(d)), on fifty-two occasions by failing to obtain incoming inspections for approximately 2,066,066 pounds of California raisins for crop year 2003-2004.

8. The respondents violated section 989.66 of the Raisin Order (7 C.F.R. §989.66) and section 989.166 of the Regulations (7 C.F.R. §989.166), by failing to hold in reserve for 294 days approximately 369.8 tons of California Natural Sun-dried Seedless raisins, and by failing to pay to the RAC $275,501.00, the dollar equivalent of the California raisins that were not held in reserve for crop year 2002-2003.

9. The respondents violated section 989.66 of the Raisin Order (7 C.F.R. §989.66) and section 989.166 of the Regulations (7 C.F.R. § 989.166), by failing to hold in reserve for 298 days approximately 305.6 tons of California Natural Sun-Dried Seedless raisins, and by failing to pay to the RAC $247,536.000, the dollar equivalent of the California raisins that were not held in reserve for crop year 2003-2004.

10. The respondents violated section 989.80 of the Raisin Order (7 C.F.R. §989.80), by failing to pay assessments to the RAC of approximately $3,438.10 for crop year 2002-2003.

11. The respondents violated section 989.80 of the Raisin Order (7 C.F.R. §989.80), by failing to pay assessments to the RAC of approximately $5,951.63 for crop year 2003-2004.

12. The respondents violated section 989.77 of the Raisin Order (7 C.F.R. §989.77), by failing to allow access to their records to the U.S. Department of Agriculture, even after being served with two subpoenas for such access.

Discussion

The handling of California raisins is subject to the requirements of the Raisin Order that came into being at the request of the raisin industry. The industry request was made to the Secretary of Agriculture pursuant to the AMAA that provides marketing tools for avoidance of disruption of the orderly exchange of agricultural commodities in interstate commerce (7 U.S.C. § 601). Among the marketing tools authorized by the AMAA for inclusion in marketing orders, are provisions that

require handlers to comply with commodity inspection provisions and reserve pool requirements that withhold for a time a portion of an agricultural commodity from the market in order to keep prices from being depressed and to yield an equitable distribution of the net returns realized in the future when the reserve is sold (7 U.S.C. § 608c(6)(E)and(F)). The AMAA also authorizes marketing orders to be administered by industry committees and for the issuance of rules and regulations to effectuate the provisions of the marketing order (7 U.S.C. § 608c(7)(C) and(D)). The constitutionality of marketing orders promulgated pursuant to the AMAA has been upheld by the Supreme Court:

> Appropriate respect for the power of congress to regulate commerce among the States provides abundant support for the constitutionality of these marketing orders....

Glickman v. Wileman Bros. & Elliott, Inc., 521 U.S. 427, 476, 117 S. Ct. 2130, 2141, 138 L.Ed. 585 (1997).

Provisions in marketing orders that require handlers to hold a portion of a commodity in reserve and pay assessments to an Administrative Committee to defray its expenses cannot be used as grounds for a taking claim since handlers no longer have a property right that permits them to market their crop free of regulatory control. *Cal-Almond, Inc.*, 30 Fed Cl. 244, 246-247 (1994), *affirmed*, 73 F.3d 381, *cert. denied*, 519 U.S. 963 (1996).

Nor may a person classified as a handler by a marketing order and made subject to its regulatory control, successfully assert an equal protection

challenge when the Secretary has set forth a rational basis for the classification. *Lamers Dairy Inc.*, 60 Agric Dec. 406, at 428 (2001) *citing, F.C.C. v. Beach Communications, Inc.* 508 U.S. 307, 313 (1993),

In response to a request for a marketing order from the California raisin industry, a hearing was held at Fresno, California on December 13 through 16, 1948. Upon the basis of the evidence received at the hearing, a decision was issued that recommended the promulgation of the Raisin Order and enunciated a rational basis for its issuance and for its various terms and provisions (14 Fed Reg. 3083). Interested parties were given an opportunity to file written exceptions to the recommended decision (Ibid). Upon consideration of the exceptions that were filed and the record evidence presented at the hearing, the Secretary of Agriculture, on July 8, 1949, found that the issuance of the Raisin Order as set forth in the recommended decision, would effectuate the declared policy of the AMAA, and ordered that a referendum be conducted among producers of raisin variety grapes grown in California to determine whether at least two-thirds of them favored its issuance (14 Fed. Reg. 3858 and 3868). The referendum was conducted and the requisite percentage of producers was found to favor the Raisin Order's terms and provisions. Those terms and provisions, as periodically amended through subsequent rulemaking proceedings, were fully applicable and governed the handling of California raisins during the 2002-2003 and 2003-2004 crop years when respondents via their partnership Lassen Vineyards, acted as first handlers of raisins.

Marvin D. Home, his family and the growers who joined his marketing association decided to enhance their profitability by avoiding the requirements of the Raisin Order. By so doing, respondents obtained an unfair competitive advantage over everyone in the raisin industry who complied with the Raisin Order and its regulations. That is what this proceeding is really about. Respondents' discussion of what acquire means and their expressed desire to achieve the policy of the Farmer-to-Consumer Direct Marketing Act are simply attempts to divert attention from their efforts to gain unfair advantage by freeing themselves from regulations the rest of their industry observed as the best way for all raisin growers and handlers to realize optimum prices.

The Raisin Order's regulatory provisions apply to "handlers" who "first handle" raisins. A "handler" is defined in the raisin order to include "any processor or packer" (7 C.F.R. § 989.15). A "packer" is defined as meaning "...any person who, within the area, stems, sorts, cleans, or seeds raisins, grades stemmed raisins, or packages raisins for market as raisins" (7 C.F.R. § 989.14). A handler becomes a "first handler" when he "acquires" raisins, a term specifically and plainly defined by the Raisin Order:

> *Acquire* means to have or obtain physical possession of raisins by a handler at his packing or processing plant or at any other established receiving station operated by him....*Provided*...., That the term shall apply only to the handler who first acquires raisins.
>
> 7 C.F.R. § 989.17, emphasis by underlining added.

Findings of Fact 7, 8 and 9, conclusively demonstrate that the respondents in their operation of the packing house they owned as Lassen Vineyards came within each of these definitions during crop years 2002-2003 and 2003-2004. As such they were required as a handler to: (1) cause an inspection and certification to be made of all natural condition raisins acquired or received (7 C.F.R. § 989.58(d)); (2) hold in storage all acquired reserve tonnage as established by the controlling Reserve tonnage regulation (7 C.F.R. § 989.66, and 7 C.F.R. § 989.166); (3) file certified reports showing: inventory, acquisition and other information required by the Raisin Committee to enable it to perform its duties (7 C.F.R. § 73); (4) allow access to inspect the packing house premises, the raisins held there, and all records for the purposes of checking and verifying reports filed (7 C.F.R. § 989.77); and (5) pay assessment to the Raisin Committee with respect to free tonnage acquired, and any reserve tonnage released or sold for use in free tonnage outlets (7 C.F.R. § 989.80).

Respondents' arguments that they did not acquire raisins are unavailing in light of the plain meaning of the language of the Raisin Order defining acquire. Moreover, if there was any ambiguity, the interpretation given by the Department of Agriculture both at the time of the Raisin Order's issuance and in subsequent correspondence with the Homes, is clear, straightforward, of long-standing and controlling. See *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984); and *Barnhart v. Walton*, 535 U.S. 212, 122 S.Ct. 1265, 152 L.Ed.2d 330 (2002).

The 1949 proposed decision which was adopted as part of the Secretary's final decision, after explaining the need for the Raisin Order, explained the language employed and clarified that:

> The term "acquire" should mean to obtain possession of raisins by the first handler thereof. The significance of the term "acquire" should be considered in light of the definition of "handler" (and related definitions of "packer" and "processor") in that the regulatory features of the order would apply to any handler who acquires raisins. Regulation should take place at the point in the marketing channel where a handler first obtains possession of raisins, so that the regulatory provisions of the order concerning the handling of raisins would apply only once to the same raisins. Numerous ways by which handlers might acquire raisins were proposed for inclusion in the definition of the term, the objective being to make sure that all raisins coming within the scope of handlers' functions were covered and, conversely, to prevent a way being available whereby a portion of the raisins handled in the area would not be covered. Some of the ways by which a handler might obtain possession of raisins include: (i) Receiving them from producers, dehydrators, or others, whether by purchase, contract, or by arrangement for toll packing, or packing for a cash consideration;....
>
> 14 Fed. Reg. 3086 (1949).

This interpretation was consistent with testimony at the hearing conducted to consider the need of the

raisin industry for a marketing order and its appropriate terms:

> Q. Mr. Hoak, suppose a packer stems, cleans, and performs other operations connected with the processing of raisins for a producer and then the producer sells the raisins to another packer. Under this proposal, which person should be required to set the raisins aside?
>
> A. The man who performs the packing operation, who is the packer.
>
> Q. Mr. Hoak, I believe that you have testified earlier that the term "packer" should include a toll packer. By that do you mean that it should include a person who takes raisins for someone for a fee?
>
> A. That is right.
>
> Q. Also, did 1 understand you to say that that person should be the one who would be required to set aside or establish the pools under the regulatory provisions?
>
> A. That is right. He is the man who would be held responsible for setting aside the required amount of raisins.
>
> Q. I take it that that man would not have title to any raisins as he is a toll packer; is that correct?
>
> A. That is right.
>
> Hearing transcript at 182-183, see Appendix A.

These excerpts from the recommended decision and the hearing transcript were sent to an attorney representing Mr. and Mrs. Horne on April 23, 2001. Apparently, they believe their personal

interpretation of the word acquire as used in the Raisin Order should take precedent over its plain language and the interpretation of its meaning that was conveyed to them by the Department of Agriculture. But under Chevron the interpretation by an agency of a regulation it issued in implementation of a statute is, unless illegal, controlling. The decision of the Homes to not follow the Department of Agriculture's interpretative advice, and instead to play a kind of shell game with interlocking partnerships and a marketing association to try to conceal their role as first handler, only shows that they acted willfully and intentionally when they decided to not file reports, not hold raisins in reserve, not have incoming raisins inspected, not pay assessments, and not allow inspection of their records for verification purposes.

The respondents have also advanced the patently specious argument that they were exempted from handler obligations under the Raisin Order because they were attempting to promote the policy of the Farmer-to-Consumer Direct Marketing Act of 1976, 7 U.S.C. §§ 3001-3006. Nowhere does the 1976 Act refer to the AMAA or make any suggestion that any of its terms have been supplanted. Moreover, the type of activity that the 1976 Act looked to encourage was the farmer market where farmer and consumer could come together directly and avoid middlemen. The respondents were instead marketing raisins to candy makers and food processors as ingredients.

Nor does the fact that the respondents primarily consider themselves to be producers exempt them from regulation by the Raisin Order for their performance of handler functions. The AMAA does

exempt from a marketing order's regulation "any producer in his capacity as a producer" 7 U.S.C. § 608c(13)(B). This has given rise to specific but limited producer-handler exemption provisions in marketing orders that regulate the handling of milk. The potential harm, these exemptions may inflict on other producers and handlers was, however, recognized and explained in *United Dairymen of Arizona v. Veneman*, 279 F.3d 1160, 1165-1166 (9th Cir 2002).

In the instant proceeding, the respondents undertook to no longer confine themselves to producer functions but to also engage in handler functions that are regulated by the Raisin Order and are not within any exemption. The fact that a portion of the raisins they packed at the Lassen Vineyard packing house were raisins of their own production did not serve to exempt their handling and packing of those raisins from regulation. Mr. and Mrs. Home had been specifically so advised by letter, dated May 20, 2002, from the Administrator of AMS:

> You indicate in your correspondence that you plan to pack and market your own raisins. Such activities would make you a handler under the order. As a handler, you would be required to meet all of the order's regulations regarding volume control, quality control (incoming and outgoing inspection), assessments, and reporting to the RAC.
>
> RX-101, Appendix B

Under these circumstances, the respondents should be ordered to pay the assessments they

withheld from the RAC, pay the dollar equivalent of the raisins they failed to hold in reserve, and be assessed a civil penalty pursuant to 7 U.S.C. § 608c(14)(B).

In determining the amount of the civil penalty, I have reviewed the recommendation of AMS in light of applicable holdings by the Judicial Officer respecting the appropriate amount to be imposed for violations similar to those committed by the respondents. See Calabrese, 51 Agric. Dec. 131, 161 (1992); *Saulsbury Enterprises*, 55 Agric. Dec. 6, 52-58 (1996); and *Strebin Farms*, 56 Agric. 1095, 1152-1157 (1997). Intentional violations of a marketing order's requirements that a handler shall pay assessments, have inspections performed, hold a percentage of the raisins handled in reserve, and file specified reports have all been held to be serious violations of both the AMAA and or a controlling marketing order that fully warrant civil penalties of $1,100 for each violation with "....each day during which such violation continues...deemed a separate violation...." (7 U.S.C. § 608c(14(B)).

Accordingly, I am following the recommendation of AMS that civil penalties be imposed on the respondents of $651,200, $1,100 per day for each of the 592 days of the crop years 2002-2003 and 2003-2004 that they failed to hold California raisins in reserve, and $80,300 for their failure to obtain inspections and file accurate reports. Civil penalties in these amounts are needed to deter the respondents from continuing to violate the Raisin Order and to deter others from similar or future violations. See Calabrese, *supra* at 162.

The following Order is herewith issued.

ORDER

It is ORDERED that respondents, Marvin D. Home, Laura R. Home and Don Durbahn, who do business as Lassen Vineyards, a general partnership, jointly and severally, are assessed a civil penalty of $731,500, are further ordered to pay to the Raisin Administrative Committee $9,389.73 in assessments for crop years 2002-2003 and 2003- 2004, and are further ordered to pay to the Raisin Administrative Committee $523,037 for the dollar equivalent of the California raisins they failed to hold in reserve for crop years 2002-2003 and 2003-2004.

A certified check or money order in payment of the civil penalty shall be sent in the amount of $731,500 made payable to "Treasurer of the United States" to Frank Martin, Jr. or Babak A. Rastgoufard, Office of the General Counsel, Room 2343-South Bldg., United States Department of Agriculture, Washington, DC 20250-1417. Payments of the $9,389.73 for owed assessments, and of the $523,037 for the dollar equivalent of the California raisins that were not held in reserve shall be sent to the Raisin Administrative Committee. These payments shall all be made within 100 days after this order becomes effective.

The provisions of this order shall become effective on the first day after this decision becomes final. Unless appealed pursuant to the Rules of Practice at 7 C.F.R. § 1.145(a), this decision becomes final without further proceedings 35 days after service as provided in the Rules of Practice, 7 C.F.R. § 1.142(c)(4).

Copies of this Decision and Order shall be served upon the parties.

Done at Washington, DC
this day of December, 2006

_____

Victor W. Palmer
Administrative Law Judge

APPENDIX I

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MARVIN D. HORNE and LAURA R. HORNE, d.b.a. RAISIN VALLEY FARMS, a partnership, and d.b.a. RAISIN VALLEY FARMS MARKETING ASSOCIATION, a.k.a. RAISIN VALLEY MARKETING, an unincorporated association; MARVIN D. HORNE; LAURA R. HORNE; DON DURBAHN, and the ESTATE OF RENA DURBAHN, d.b.a. LASSEN VINEYARDS, a partnership,
Plaintiffs-Appellants,

v.

UNITED STATES DEPARTMENT OF AGRICULTURE,
Defendant-Appellee.

No. 10-15270

D.C. No. 1:08-cv-01549-LJO-SMS
Eastern District of California
Fresno

ORDER

Before: REINHARDT, HAWKINS, and GOULD, Circuit Judges.

Plaintiffs-Appellants' Motion for Leave to File Supplemental Brief in Support of Petition for Panel Rehearing or Rehearing *En Banc* is DENIED.

APPENDIX J

No. 10-15270

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MARVIN D. HORNE AND LAURA R. HORNE, D.B.A. RAISIN VALLEY FARMS, A PARTNERSHIP, AND D.B.A. RAISIN VALLEY FARMS MARKETING ASSOCIATION, A.K.A. RAISIN VALLEY MARKETING, AN UNINCORPORATED ASSOCIATION; MARVIN D. HORNE; LAURA R. HORNE; DON DURBAHN, AND THE ESTATE OF RENA DURBAHN, D.B.A. LASSEN VINEYARDS, A PARTNERSHIP,

Plaintiffs-Appellants,

v.

UNITED STATES DEPARTMENT OF AGRICULTURE,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA
No. 1:08-CV-01549-LJO-SMS

SUR-REPLY TO PETITION FOR REHEARING AND REHEARING EN BANC

TONY WEST
Assistant Attorney General

BENJAMIN W. WAGNER
United States Attorney

MICHAEL S. RAAB
KELSI BROWN CORKRAN
(202) 514-3159
Attorneys, Appellate Staff
Civil Division, Room 7216
950 Pennsylvania Ave., NW
Washington, DC 20530

[TABLE OF CONTENTS AND TABLE OF AUTHORITIES OMITTED]

INTRODUCTION

Plaintiffs do not contest that the Tucker Act, 28 U.S.C. § 1491(a), vests exclusive jurisdiction over takings claims in the United States Court of Federal Claims. Instead, they argue that the Agricultural Marketing Agreement Act, 7 U.S.C. § 608c(15) ("AMAA"), withdraws Tucker Act jurisdiction over

their particular takings claim, thus allowing them to assert that challenge in this suit. But the AMAA's administrative and judicial review provisions apply only to handlers. The raisins set aside for reserve under the regulatory scheme belong to producers, and therefore any takings claim that plaintiffs assert is in their capacity as producers, not handlers. When a producer-handler asserts an injury in its capacity as a producer, the AMAA's administrative and judicial review provisions do not apply.

Lion Raisins, Inc. v. United States, 416 F.3d 1356 (Fed. Cir. 2005) involved wholly distinguishable claims. *Lion*, a producer-handler, asserted takings claims arising out of the alleged failure of the Raisin Administrative Committee ("RAC") to fulfill its statutory obligation to distribute reserve pool proceeds among producers, as well as its regulatory obligation to compensate handlers for expenses incurred in storing reserve raisins. The Federal Circuit found neither claim cognizable under the Tucker Act because takings claims cannot be premised on regulatory or statutory violations, and because *Lion* had not actually asked the agency for compensation for its storage expenses. *See id.* At 1369-72. It is with respect to the storage expenses only that the Federal Circuit held, and the government agreed, that the AMAA required *Lion* to seek equitable restitution from the agency under section 608c(15) of the Act rather than seeking compensation directly in the Court of Federal Claims. Neither the Federal Circuit nor the government suggested that the AMAA withdraws Tucker Act jurisdiction where, as here, the plaintiff asserts a Fifth Amendment takings claim rather

than a claim that the RAC failed to comply with its statutory or regulatory obligations.

Plaintiffs' merits argument fares no better. Plaintiffs cannot demonstrate that the regulatory regime effectuates a per se, physical taking, as evidenced by plaintiffs' inability to point to any actual appropriation of their property by the government. Plaintiffs' suit challenges fines imposed on plaintiffs because they voluntarily chose to sell raisins on the open domestic market without complying with a regulatory regime that was put in place to stabilize the prices that plaintiffs and other raisin producers receive for their crop. While plaintiffs are free to challenge that regime as effectuating a compensable regulatory taking, they fall far short of establishing that they suffered the sort of physical taking that automatically entitles a property owner to compensation.

ARGUMENT

1. Plaintiffs do not dispute that the Tucker Act vests the United States Courts of Federal Claims with exclusive jurisdiction over takings claims. Instead, plaintiffs argue that they may assert their takings challenge in this suit because the AMAA withdraws Tucker Act jurisdiction over takings claims by handlers. *See* Rh'g Reply ("Reply") 2-3. But any takings claim asserted by plaintiffs arises in their capacity as producers, not handlers. As plaintiffs repeatedly acknowledge, although handlers are tasked with responsibility for sorting the raisins, it is producers who own the raisins set aside for reserve and who receive no direct payment when title to a portion of their crop is transferred to the

RAC. *See, e.g.*, Rh'g Pet. 5-6 (describing the raisin reserve program as "effect[ing] a direct transfer of title of a *producer's* 'reserve tonnage' raisins to the government) (emphasis added); *id.* at 11 (asserting that "[t]he government demands that raisin *producers* give a government committee ownership over a hefty proportion of the producers' crop") (emphasis added). Plaintiffs have not argued that the regulatory regime results in a government taking of any property belonging to handlers.

To be sure, the enforcement order that plaintiffs challenge in this suit was imposed on them in their capacity as handlers, and thus required administrative exhaustion under the AMAA. Plaintiffs do not contend, however, that that order effectuates a taking, nor could they; the order simply imposes penalties on plaintiffs for failing to comply with the regulatory scheme. Instead, plaintiffs argue that the raisin reserve program effectuates an unconstitutional taking of property from producers, thus justifying their refusal to comply with the regulatory obligations imposed on handlers. But as the Supreme Court and this Court have repeatedly held, a takings challenge against the federal government is "premature until the property owner has availed itself of the process provided by the Tucker Act." *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 195 (1985); *see also, e.g., Consejo de Desarrollo Economico de Mexicali, A.C. v. United States*, 482 F.3d 1157, 1172 (9th Cir. 2007); *Bay View, Inc. v. Ahtna, Inc.*, 105 F.3d 1281, 1285 (9th Cir. 1997).

Nothing in the AMAA precludes plaintiffs from alleging in the Court of Federal Claims that the

raisin reserve program injures them in their capacity as producers by subjecting them to a taking of their crop without compensation. In determining whether a particular claim brought by a producer-handler is subject to the AMAA's administrative and judicial review scheme, "the crucial question is whether a producer-handler is bringing suit in its capacity as a producer or as a handler." *Edaleen Dairy, LLC v. Johanns*, 467 F.3d 778, 783 (D.C. Cir. 2006). Courts have consistently recognized that when a producer-handler asserts an injury in its capacity as a producer, the AMAA's administrative exhaustion and judicial review requirements do not apply. *See Arkansas Dairy Co-op Ass'n, Inc. v. U.S. Dept. of Agriculture*, 573 F.3d 815, 823 n.4 (D.C. Cir. 2009) ("Where a single entity acts as a vertically-integrated 'producer-handler,' it must exhaust before bringing suit in its capacity as a handler, but not when bringing suit in its capacity as a producer"); *see also Alto Dairy v. Veneman*, 336 F.3d 560, 569 (7th Cir. 2003); *Dairylea Co-op., Inc. v. Butz*, 504 F.2d 80, 82-83 (2d Cir. 1974).[1]

---

[1] This Court has recognized that by including in the AMAA a comprehensive administrative and judicial review scheme for handlers but not producers, Congress divested courts of authority to entertain producer challenges to marketing orders where their interests are already represented by handlers. *See, e.g., United Dairymen of Arizona v. Veneman*, 279 F.3d 1160, 1164-67 (9th Cir. 2002). But no handler would have standing to assert a takings claim based on the raisin reserve requirement because the transfer of property occurs exclusively between the RAC and producers. And any producer-handler asserting such a claim would be doing so in its capacity as a producer. *See* supra p. 3. Plaintiffs' takings challenge thus falls outside the category of producer claims for which the AMAA precludes judicial review. *See Stark v. Wickard*, 321 U.S. 288, 309-10 (1944)

With respect to their takings claim, then, plaintiffs are situated exactly like the plaintiff raisin producer whose takings claim was adjudicated by the Court of Federal Claims in *Evans v. United States*, 74 Fed. Cl. 554 (2006). And where, as here, a takings claim may be brought in the Court of Federal Claims, the Tucker Act requires that the claim be brought in that court. *See Eastern Enterprises v. Apfel*, 524 U.S. 498, 520 (1998) (plurality opinion) (a takings claim "must be brought to the Court of Federal Claims in the first instance, unless Congress has withdrawn the Tucker Act grant of jurisdiction in the relevant statute").[2]

2. Plaintiffs misapprehend both the Federal Circuit's holding and the government's position in *Lion* Raisins, Inc. v. United States, 416 F.3d 1356 (Fed. Cir. 2005). *Lion*, a raisin producer-handler, asserted two takings claims under the Tucker Act. First, in its capacity as a producer, *Lion* alleged that it was entitled to compensation because the RAC had, in violation of its statutory and regulatory obligations, used reserve pool proceeds to finance future export programs rather than distributing them among the producers who had an equitable interest in those proceeds. *Id.* at 1361. Second, in its

---

(allowing a producer to challenge an alleged infringement of a "definite personal right[ ]" under a milk marketing order).

[2] *Wallace v. Hudson-Duncan Co.*, 98 F.2d 985 (9th Cir. 1938), does not suggest otherwise. The plaintiff in that case was a walnut handler who brought a takings claim based on a marketing order that allegedly effectuated a taking of the plaintiff's property in its capacity as a handler. *See id.* at 987. This Court's adjudication of that claim in no way indicates that the AMAA withdraws Tucker Act jurisdiction over takings claims brought by producer-handlers in their capacity as producers.

capacity as a handler, *Lion* alleged that it was entitled to compensation because the RAC, in violation of its regulatory and contractual obligations, failed to reimburse *Lion* for several thousand raisin bins that belonged to *Lion* and were not returned after they were used to ship reserve raisins pursuant to the RAC's instructions. *Id.*; *see also Evans*, 74 Fed. Cl. at 558-59 (explaining that *Lion* asserted its reserve pool claim in its capacity as a producer and its bins claim in its capacity as a handler).

The Federal Circuit held that neither claim was cognizable under the Tucker Act because the law is "clear that a claim premised on a regulatory [or statutory] violation does not state a claim for a taking." *Id.* at 1369-70. Moreover, the court of appeals explained, with respect to the bin claim, the agency's regulations specifically obligated the RAC to compensate handlers for expenses incurred in storing and handling reserve raisins. Accordingly, *Lion* was free to seek equitable restitution via the administrative review process provided in the AMAA. *Id.* at 1371-72.

It is in this context only that the Federal Circuit held, and the government agreed, that "the takings claim may not be brought against the government because the statute provides for an administrative remedy." Reply 4 (quoting *Lion*, 416 F.3d at 1358); *see also Lion*, 416 F.3d at 1371 n.12 (quoting government counsel as agreeing that *Lion* could file a section 608c(15)(A) petition with respect to "claims of the sort *involved in the bin case*") (emphasis added). The Federal Circuit did not hold, as plaintiffs suggest, that the Court of Federal Claims lacked

jurisdiction over *Lion*'s claims simply "because [*Lion*] was a 'handler' under the AMAA." Reply 3-4.

Plaintiffs' takings claim is wholly distinct from those in *Lion*. Plaintiffs do not allege that the raisin reserve requirement is contrary to any statutory or regulation provision, nor do they argue that any statutory or regulatory provision entitles them to compensation for any raisins they reserve. Their takings claim rests solely on the view that the raisin reserve requirement entitles producers to compensation under the Fifth Amendment. That is precisely the sort of claim that Congress intended the Tucker Act to govern. Indeed, *Lion* expressly contemplates Tucker Act jurisdiction over takings claims against the RAC premised on the Fifth Amendment rather than the RAC's alleged failure to comply with its statutory, regulatory, or contractual obligations. Although the government had argued that the United States could not be held liable for an alleged taking by a non-appropriated funds instrumentality ("NAFI") such as the RAC, the Federal Circuit rejected that argument, holding that "[t]he RAC is an agent of the United States, and the United States may properly be sued in the Court of Federal Claims for any takings that are allegedly consummated by the acts of its agent." *Lion*, 416 F.3d at 1368; *see also id.* at 1358 ("[T]he Court of Federal Claims has jurisdiction over takings claims against the United States based on the actions of the RAC."). And nothing in the decision supports plaintiffs' assertion that their status as handlers is sufficient in itself to preclude Tucker Act jurisdiction; if that were true, the Federal Circuit would have dismissed *Lion*'s claims on that basis alone rather than considering in detail whether

administrative remedies were available for takings *Lion* alleged.

3. Plaintiffs' final jurisdictional argument is they must be allowed to assert their tak challenge now before this Court because they not previously aware that the raisin reserve pro applied to them, and therefore this suit presents only opportunity they had to present the cl Reply 8-9. It is unclear why plaintiffs believe their purported misunderstanding about regulatory obligations would have any bearin this Court's jurisdiction, nor do they provide support for their contention that "post-enforce Takings Clause challenges" fall under a never b identified exception to the Tucker Act's excl jurisdiction over takings claims. Reply Br. 9.

In any event, the record below establishes beginning a year before the time period for whic USDA imposed fines on plaintiffs, the ag repeatedly notified plaintiffs that their bus model rendered them handlers under the r marketing order. *See* Appellee's Br. 6-13. plaintiffs had chosen at that point to comply wit regulatory regime, they could have avoided pa fines while also *seeking* compensation in the Cou Federal Claims for the portion of their crop plac reserve. To be sure, for the reasons already expla by this Court, *see* Op. 9467-75, and in *Evans*, 74 Cl. at 554, plaintiffs' claim lacks merit and wou properly denied in the Court of Federal Claims as it was denied here. The government's poi simply that the Tucker Act vests the Cou Federal Claims with exclusive jurisdictio adjudicate the claim.

4. Plaintiffs' Reply repeats their argument that the RAC subjected them to a per se, physical taking without compensation, but does not overcome the critical problem with their claim: the RAC never actually took or even attempted to take possession of plaintiffs' raisins. The absence of any appropriation of physical property in this case is not a technicality arising from the procedural posture of plaintiffs' claim. Plaintiffs cannot point to an actual transfer of their raisins to the government because the regulatory regime they challenge does not effectuate a physical taking. As this Court explained, "[f]ar from compelling a physical taking of the Hornes' tangible property, the Raisin Marketing Order applies to the Hornes only insofar as they voluntarily choose to send their raisins into the stream of interstate commerce. Simply put, it is a use restriction, not a direct appropriation." Op. 9470. And even after plaintiffs chose to sell raisins on the open domestic market, the government did not "come onto the Hornes' farm uninvited and walk off with . . . their crops." *Id.* at 9469-70. Plaintiffs brought this suit to appeal fines they incurred for failing to comply with a regulatory regime specifically designed to stabilize prices for the commodity that plaintiffs voluntarily chose to sell. Plaintiffs' takings challenge to those fines falls squarely within the category of claims that must be adjudicated under the Penn Central factors for determining whether a regulatory requirement constitutes a compensable taking. *See Penn. Cent. Transp. Co. v. N.Y.C.*, 438 U.S. 104, 124 (1978) (considering the economic impact of the regulation on the claimant, the extent to which the regulation interferes with reasonable

investment- backed expectations, and the character of the governmental action).

This Court did not hold, nor has the government argued, that plaintiffs are precluded from bringing any takings challenge to the regulatory regime. The Court simply held that plaintiffs failed to demonstrate that they suffered a physical taking of their crop within the meaning of *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). *See* Op. 9475. If plaintiffs wish to challenge the raisin reserve program as effectuating a compensable regulatory taking, they are free to do so in the Court of Federal Claims.

CONCLUSION

For the foregoing reasons, this Court should deny the petition for rehearing or rehearing en banc.

Respectfully submitted,

TONY WEST
Assistant Attorney General

BENJAMIN W. WAGNER
United States Attorney

MICHAEL S. RAAB
KELSI BROWN CORKRAN
(202) 514-3159
Attorneys, Appellate Staff
Civil Division, Room 7216
950 Pennsylvania Ave., NW
Washington, DC 20530

[CERTIFICATE OF COMPLIANCE AND CERTIFICATE OF SERVICE OMITTED]

APPENDIX K

No. 10-15270

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MARVIN D. HORNE AND LAURA R. HORNE, D.B.A. RAISIN VALLEY FARMS, A PARTNERSHIP, AND D.B.A. RAISIN VALLEY FARMS MARKETING ASSOCIATION, A.K.A. RAISIN VALLEY MARKETING, AN UNINCORPORATED ASSOCIATION; MARVIN D. HORNE; LAURA R. HORNE; DON DURBAHN, AND THE ESTATE OF RENA DURBAHN, D.B.A. LASSEN VINEYARDS, A PARTNERSHIP,

Plaintiffs-Appellants,

v.

UNITED STATES DEPARTMENT OF AGRICULTURE,

Defendant-Appellee.

On Appeal from the United States District Court
for the Eastern District of California (O'Neill, J.)
Civil Action No. 1:08-cv-01549-LJO-SMS

REPLY BRIEF IN SUPPORT OF PETITION FOR PANEL REHEARING OR REHEARING *EN BANC*

Brian C. Leighton

Attorney at Law
701 Pollasky Avenue
Clovis, CA 93612
(559) 297-6190

Michael W. McConnell
Aditya Bamzai
KIRKLAND & ELLIS LLP
655 Fifteenth Street, N.W.
Washington, DC 20005
(202) 879-5000
Counsel for Plaintiffs-Appellants

December 30, 2011

[TABLE OF CONTENTS OMITTED]

INTRODUCTION

The Government's Opposition brief ("Opp.") to Plaintiffs' Petition for Rehearing ("Pet.") makes little attempt to defend the panel's reasoning and instead puts forward an array of new arguments never before raised in this litigation. The Government now contends that this Court lacks jurisdiction to address Plaintiffs' takings claim; that the physical takings doctrine does not apply to personal property; and that the taking at stake in this case should be analyzed under the test for mitigation measures in the land-use context. None of these new arguments has merit.

Indeed, the Opposition confirms the importance of this case for property rights within this Circuit. The Government boldly asserts the constitutional power:

- To take goods without compensation from a producer as a condition for the producer's participation in the marketplace;

- To assert, as the purpose for its taking, that it has somehow boosted the price of the producer's remaining goods; and

- To use the goods for any purpose it sees fit, including school lunch programs, without paying the producer for them.

Plaintiffs respectfully submit that these consequences are precisely what the Fifth Amendment was intended to foreclose. Accordingly, for the reasons explained in the Petition and elaborated upon below, this case cries out for rehearing, either by the panel or the *en banc* Court.

ARGUMENT

I. The Government's Newly Minted Jurisdictional Argument Lacks Merit And Is Inconsistent With the Government's Prior Interpretation Of The AMAA.

For the first time in this litigation, the Government asserts that this Court lacks jurisdiction to adjudicate Plaintiffs' takings claim. Opp. 6-8. According to the Government's new position, the Tucker Act vests exclusive jurisdiction over the claim in the United States Court of Federal Claims. This newly minted argument conflicts not only with cases interpreting the Agricultural Marketing Agreement Act of 1937 ("AMAA"), *see,*

e.g., *Lion Raisins, Inc. v. United States*, 416 F.3d 1356, 1372 (Fed. Cir. 2005), but also with the Government's prior position in other cases.

It is well-settled, as the Government recognizes, that Congress may "withdraw[] the Tucker Act grant of jurisdiction" by statute. *Eastern Enterprises v. Apfel*, 524 U.S. 498, 520 (1998). Such withdrawal occurs, for example, when Congress enacts a "specific and comprehensive scheme for administrative and judicial review." *Lion Raisins*, 416 F.3d at 1372.

The AMAA creates such a "specific and comprehensive scheme" for "handlers" of raisins. Any "handler" who violates a marketing order is subject to fines and penalties in a final order of the Department of Agriculture, which is "reviewable in the district courts of the United States in any district in which the handler subject to the order is an inhabitant." 7 U.S.C. § 608c(14)(A)-(B). A "handler" may also bring a pre-enforcement petition with the Secretary of Agriculture arguing that a marketing order "is not in accordance with law." *Id.* § 608c(15)(A). The "District Courts of the United States in any district in which such handler is an inhabitant, or has his principal place of business, are [ ] vested with jurisdiction in equity to review such ruling." *Id.* § 608c(15)(B). Taken together, these provisions make clear that handlers must bring challenges to marketing orders and enforcement decisions in U.S. district courts, not in the Federal Court of Claims under the Tucker Act.

Case law supports this interpretation. In *Lion Raisins*, a raisin producer brought a Tucker Act

claim alleging (in relevant part) that the Raisin Administrative Committee ("RAC") had taken its storage bins without just compensation. *Id.* at 1370. The Federal Circuit held that, because the plaintiff was a "handler" under the AMAA, the Federal Court of Claims lacked jurisdiction over this claim. The court noted that section 608c(15) "provides an administrative remedy to handlers wishing to challenge marketing orders under the AMAA" and "vests the district courts with jurisdiction to review the Secretary's decision." *Id.* The court held that "the takings claim may not be brought against the government because the statute provides for an administrative remedy and for judicial review in district court." *Id.* at 1358; *see also* Wright & Miller, *Federal Practice & Procedure* § 3657 & n.33.

Indeed, *the Government itself* urged the Federal Circuit to adopt this holding. As the court observed, "[d]uring oral argument, counsel for the United States acknowledged that [plaintiff] has an administrative remedy and may file a section 608(c)(15)(A) petition seeking redress for the RAC's alleged actions." 416 F.3d at 1371. The court specifically asked the Government's counsel whether she would represent, "speaking with the authority of the Secretary of Agriculture, that the Secretary reads this statute broadly enough to encompass claims of the sort involved in the bin case?" *Id.* at 1371 n.12 (quoting the oral argument transcript). Counsel for the Government unequivocally responded "Yes." *Id.* The instant case demonstrates why the court was wise to demand assurance on this point, because otherwise the Government could play the game of claiming that

district courts have jurisdiction when handlers attempt to use the Tucker Act to challenge a taking, and claiming the case falls under the Tucker Act when handlers sue in district court.

In *Wallace v. Hudson-Duncan & Co.*, 98 F.2d 985 (9th Cir. 1938), this Court addressed a takings clause challenge to a walnut marketing order in a posture comparable to this case. The plaintiff, a handler, sought a "declaratory decree" under section 608c(15) that the walnut marketing order resulted in a taking of its private property. *See id.* at 986-87 & n.1, 989-91. This Court addressed the claim on the merits. Although the Government incorrectly cites *Wallace* as a case in which "this Court rejected a virtually identical takings claim," Opp. 17, it fails to recognize that, in order to resolve the takings claim, this Court must have asserted jurisdiction over it.

In the face of these precedents, the Government's statement that "[n]othing in the AMAA precludes a Tucker Act claim for an alleged taking under a marketing order" is difficult to comprehend. Opp. 7. By providing district court jurisdiction for both pre-enforcement and post-enforcement orders, the AMAA displaces the Tucker Act. It is equally difficult to comprehend what the Government means when it asserts that it is improper for Plaintiffs to ask this Court to decide "the hypothetical question whether the raisin marketing order would amount to an unconstitutional taking were it not compensable under the Tucker Act." Opp. 8. There is nothing hypothetical about the question. Plaintiffs challenge an attempt by the Government to seek the

monetary equivalent of the raisins that the Raisin Marketing Order, on the Government's interpretation, required them to hand over. It makes no sense for the Government to ask this Court to uphold its order requiring Plaintiffs to pay the monetary equivalent, and then demand that they file a second suit under the Tucker Act to recover their money in the form of just compensation for the taking. This is not a suit seeking money damages, nor a suit to enjoin a taking; it is an administrative appeal from an agency order on the ground that it constitutes a taking. *See Apfel*, 524 U.S. at 521-22. In such a case, where a separate "claim for compensation would entail an utterly pointless set of activities," the Tucker Act does not apply. *Id.* at 520 (quotation marks omitted).

The Government cites several cases from the federal courts of appeals and a single case from the Court of Federal Claims. But the cases are inapposite. The court of appeals cases do not involve the specific review provisions available under 608c, but rather statutory schemes that — in contrast to the AMAA — lack any specialized review procedure. And the Court of Federal Claims case addresses a takings claim that could not be brought using the specialized procedures set forth in section 608c. In *Evans v. United States*, 74 Fed. Cl. 554 (2006), the plaintiffs were not handlers and therefore were not subject to the review procedures of section 608c. *See id.* at 555. The court made this very point: "As producers, plaintiffs are specifically excluded from the Agricultural Marketing Act's scope, 7 U.S.C. § 608c(13)(B), and administrative remedies are limited to handlers, 7 U.S.C. § 608c(15)." *Id.* at 564. The Government is thus wide of the mark in

its assertion that "the Court of Federal Claims already adjudicated exactly such a claim" — and in its accusation that Plaintiffs have brought their claim in the Ninth Circuit because they "prefer to avoid" the Court of Claims' jurisprudence. Opp. 8. The Government itself brought this enforcement action under section 608c(14) against Plaintiffs in the Department of Agriculture. Having done so, the Government is in no position to fault Plaintiffs for requesting review in this Court using the very appeal processes established in the AMAA.

In a variation on its jurisdictional argument, the Government contends that Plaintiffs may not bring post-enforcement takings challenges to marketing orders at all. The Government raises this issue as part of its jurisdictional argument, *see* Opp. 6 (arguing that Plaintiffs cannot challenge "the USDA's imposition of fines based on plaintiffs' failure to comply with the regulatory scheme"); *see id.* at 6-8, and as part of its merits argument, *see id.* at 10. In neither instance does the Government cite any case law supporting its position. And for good reason: the argument is groundless — whether characterized as jurisdictional or merits.

The facts of this case amply illustrate why the Government's position is meritless. Here, because Plaintiffs did not believe themselves to be handlers subject to the Raisin Marketing Order, they did not believe they were required to set aside the reserve-tonnage requirement to give the RAC. The Government then initiated an enforcement action under section 608c(14) against Plaintiffs in the USDA. The USDA disagreed with Plaintiffs' interpretation of the term "handler," determined

that they are subject to the Raisin Marketing Order, and ordered Plaintiffs to pay the alleged dollar equivalent of the disputed raisins for the relevant crop years. According to the Government's new position, Plaintiffs forever waived their Takings Clause challenge to the Raisin Marketing Order because they did not believe themselves to be subject to that Order in the first place. There is no basis in law or logic to limit post-enforcement Takings Clause challenges in this manner. If a government order would be an unconstitutional taking, the victim of the taking cannot be fined the value of his property for refusing to comply, without opportunity to challenge the constitutionality of the underlying order.

Even if, however, there were (as the Government now claims) "a serious jurisdictional problem" with Plaintiffs' takings claim, Opp. 3, it would be reason to grant Plaintiffs' rehearing petition, not deny it. The panel affirmed on the merits. A dismissal of Plaintiffs' takings claim for lack of jurisdiction would require a different disposition of the case — dismissal rather than affirmance on the merits, with the opportunity for plaintiffs to take their case to a court with jurisdiction. *See Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83 (1998). Up until its most recent filing with this Court, the Government repeatedly agreed that this Court and the District Court had jurisdiction over Plaintiffs' takings claim. It would be manifestly unjust for this Court to allow the Government to preserve its victory on the merits by arguing that the panel was wrong to exercise jurisdiction.

II. The Government's Arguments That Plaintiffs Have Not Established A Takings Claim Lack Merit.

A. Plaintiffs Have Established A Physical Taking Under *Loretto*.

As explained in the Petition for Rehearing, the Supreme Court has squarely held that a person's right to participate in the market "may not be conditioned on his forfeiting the right to compensation for a physical occupation." *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 439 n.17 (1982). The Government studiously ignores this holding, instead making two arguments for *Loretto*'s inapplicability. First, the Government argues that the physical takings doctrine does not apply to personal property, but only to real property. Opp. 9-14. Second, the Government argues that later Supreme Court cases have 10 *sub silentio* overruled this holding of *Loretto*. Opp. 14-16. Both are meritless.

1. The Government's Argument That *Loretto* Does Not Apply To Personal Property Is Meritless.

The Government fails to cite a single case supporting its lead argument — made for the first time in this litigation in its Opposition — that the *per se* doctrine of *Loretto* does not apply to personal property. Even Magna Charta provided that King could not "take grain or other chattels of any one without immediate payment." Magna Charta, ch. 28, *reprinted in* 1 Bernard Schwartz, THE BILL OF

RIGHTS: A DOCUMENTARY HISTORY (1971). The first treatise on the United States Constitution, published in 1803, observed that the Takings Clause was enacted in response to "the arbitrary and oppressive mode of obtaining supplies for the army, and other public uses, by impressment, as was too frequently practiced during the revolutionary war, without any compensation whatever." 1 Henry St. George Tucker, BLACKSTONE'S COMMENTARIES app. at 305-06 (1803). The government's expropriation of raisins to use in school lunches raises the same issue.

Moreover, the Supreme Court has, albeit in *dicta*, included personal property within the category of property subject to the *per se* taking rule. *See United States v. Sperry Corp.*, 493 U.S. 52, 62 n.9 (1989). And *Loretto* itself relied on scholarship applying the physical takings doctrine to personal property. *See* 458 U.S. at 427 n.5.

Lower court precedent is to the same effect. In *Nixon v. United States*, 978 F.2d 1269 (D.C. Cir. 1992), the Government argued that "the *per se* takings doctrine applies only to the physical occupation of *real* property," reasoning (as here) that "the holding of *Loretto* is a narrow one." *Id.* at 1284. Judge Edwards, writing for the court, declared unequivocally that "[t]he argument fails for want of authority or logic." *Id.* "[T]he actual holding of *Loretto* makes no mention of a distinction between real and personal property, nor was any rationale given in the opinion that might justify such a distinction." *Id.*; *see also id.* at 1285 ("One may be just as permanently and completely dispossessed of personal property as of real property. Any

distinction along these lines would be purely artificial.").

The Government scrambles unsuccessfully to distinguish *Nixon*. It asserts that "the court of appeals did not hold that *all* personal property falls under the *Loretto* rule," because the Government in that case "had actually taken 'complete possession' of [presidential] papers contrary to the expectation 'since the beginning of the Republic,' that a President's papers are his private property." Opp. 12 (quoting *Nixon*, 978 F.2d at 1271, 1276-84).

That is a sheer rewriting of the opinion. The reference in the opinion to longstanding "expectations" addressed who is the owner of presidential papers. One might think the Nation who paid his salary, rather than the individual, owns the papers, but the historical expectation to the contrary resolved that issue. Upon determining that President Nixon owned the papers, the D.C. Circuit applied the *per se* taking doctrine to personal property without any balancing or analysis of expectation interests. *See* 978 F.2d at 1284-85. Because no one — not even the Government — has questioned that a farmer owns his crops, the first stage in the *Nixon* analysis is not at issue here. What matters is the second stage: an unequivocal holding that the doctrine of *per se* takings applies to personal property, whether it be raisins or rune stones.

2. The Government's Argument That The Supreme Court Has *Sub Silentio* Overruled *Loretto* Is Meritless.

The Government next argues that the holding in *Loretto* on which we rely has subsequently "been rejected by the Supreme Court" in *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374 (1994), two land-use cases. But the Government points to no language in either *Nollan* or *Dolan* that could be interpreted as overruling *Loretto*, nor does it cite any authority extending *Nollan* and *Dolan* outside the land-use context.

In *Nollan* and *Dolan*, the Supreme Court considered "takings challenges to adjudicative land-use exactions — specifically, government demands that a landowner dedicate an easement allowing public access to her property as a condition of obtaining a development permit." *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 546 (2005). "In each case, the Court began with the premise that, had the government simply appropriated the easement in question, this would have been a *per se* physical taking." *Id.* The Court, however, noted that it has "long recognized that land-use regulation does not effect a taking if it 'substantially advance[s] legitimate state interests' and does not 'den[y] an owner economically viable use of his land'" — which, the Court explained, required that the regulation further the same government interest that would furnish a valid ground for denial of the permit. *See Nollan*, 483 U.S. at 834. To be permissible without compensation, a condition on a land-use permit that would otherwise constitute a taking must be a mitigation measure both directly related and proportionate to the injury the public suffers from the grant of the permit. *Dolan*, 512 U.S. at 391. Thus, in *Nollan*, a lateral easement arguably

would have mitigated the public's loss of access to the beach caused by the permitted construction, but a horizontal easement along the beach did not, and was therefore a taking that required compensation.

A wealth of precedents limits *Nollan* and *Dolan* to the land-use context. *See, e.g.*, *Lingle*, 544 U.S. at 547 ("We have not extended [the *Nollan/Dolan*] standard 'beyond the special context of [land-use] exactions.'") (quoting *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 702 (1999) (same)); *West Linn Corporate Park, LLC v. City of West Linn*, 428 Fed. Appx. 700, 702 (9th Cir. Apr. 18, 2011) ("The Supreme Court has not extended *Nollan* and *Dolan* beyond situations in which the government requires a dedication of private real property."); *Iowa Assurance Corp. v. City of Indianola*, 650 F.3d 1094, 1099 (8th Cir. 2011) ("*Nollan* only applies to land-use exactions."). The Government simply fails to acknowledge these cases.

Indeed, the Eleventh Circuit in *Gulf Power Co. v. United States*, 187 F.3d 1324 (11th Cir. 1999), and this Court in *Hall v. City of Santa Barbara*, 833 F.2d 1270 (9th Cir. 1987), *abrogated on other grounds*, *Yee v. City of Escondido*, 503 U.S. 519 (1992), applied *Loretto*'s *per se* rule to the Government's attempt to condition a property-owner's right to participate in the marketplace on a requirement that the owner physically transfer some portion of his property to the government. Those decisions are directly applicable here, and controlling.

The Government claims that *Gulf Power* does not "even obliquely conflict" with the panel's interpretation of *Loretto*, Opp. 13, but asserts only two irrelevant grounds as a possible distinction.

First, the Government claims that *Gulf Power* is distinguishable because "Plaintiffs here challenge a fine that was imposed on them" due to their alleged noncompliance with the Raisin Marketing Order's requirement that they turn over their property to the RAC. This is just a reiteration of the Government's argument that Plaintiffs may not bring a post-enforcement takings challenge. As explained above, this argument has no merit. *See supra* pp. 8-9. Second, the Government argues that the "fines that the government imposed were fully consistent with historical expectations." Opp. 13. But *Gulf Power* contains no discussion of a party's "investment-backed expectations," because no such analysis is relevant in the context of physical takings. *See Loretto*, 458 U.S. at 432; *Palazzolo v. Rhode Island*, 533 U.S. 606, 628 (2001). The Opposition abundantly confirms that *Gulf Power* conflicts with the panel's decision.

The Government also argues that, in *Yee*, the Supreme Court rejected this Court's holding in *Hall* that *Loretto* "gave short shrift" to "the notion that the physical occupation is not permanent" where a property owner can avoid a taking "by going out of business." 833 F.2d at 1277-78, *abrogated on other grounds*, *Yee*, 503 U.S. at 525-26. But the Government simply ignores our argument that "*Yee* did not involve a compelled transfer of ownership to the government, but merely a rent control scheme, which is a classic economic regulation." Pet. 14-17. It also conveniently disregards the Supreme Court's reaffirmance in *Yee* of the very footnote in *Loretto* that the Government claims the Supreme Court

has subsequently repudiated. *See* 503 U.S. at 531-32 (approving of *Loretto*'s footnote 17).

B. It Is Irrelevant That The Government's Stated Purpose Is To Raise Prices For Raisin Growers.

Finally, the Government appears to argue that uncompensated takings of property cannot fall within the Fifth Amendment if the regulation's "express purpose" is to increase the "amount of money plaintiffs and other raisin farmers receive for their products." Opp. 5, 18. The Supreme Court has rejected that argument. In *Phillips v. Washington Legal Foundation*, 524 U.S. 156 (1998), the Court noted:

> [In *Loretto*,] we held that a property right was taken even when infringement of that right arguably increased the market value of the property at issue. Our conclusion in this regard was premised on our longstanding recognition that property is more than economic value; it also consists of 'the group of rights which the so-called owner exercises in his dominion of the physical thing,' such 'as the right to possess, use and dispose of it.'

Id. at 170 (citations omitted).

Even assuming for sake of argument that a properly designed program removing a certain portion of the crop from the market might increase crop prices, this provides no justification for the Government taking title to the unmarketed portion

of every farmer's raisin crop and using it for the federal school-lunch program and other governmental purposes. *Cf. Dolan*, 512 U.S. at 392-93 (although an open-space requirement would mitigate increased water run-off, this provided no justification for requiring the landowner to open his land to the public for recreation). Indeed, this aspect of the marketing order program is counterproductive to the ostensible price-raising purpose. Rather than taking the reserve-tonnage raisins off the market, the Government uses the raisins for economically beneficial purposes as it sees fit, thereby ensuring that the supposed "increase in prices through scarcity" does not occur. As in *Nollan*, the condition that the Government imposes on Plaintiffs "utterly fails to further the end advanced as the justification." 483 U.S. at 837.

In light of these uncontested facts, it is truly remarkable for the Government to assert that Plaintiffs have failed "to put forth any evidence or explanation as to how the raisin reserve requirement has a negative financial impact on their business." Opp. 18. What more is there to say? The Government sought to take $483,843.53 worth of raisins over the two year period in question. It is commonly accepted that having one's property taken and used by someone else, without compensation, has a "negative financial impact" on business. The Government's assertion that Plaintiffs must make some further showing defies common sense.

C. The Panel Opinion's Reasoning Has Dramatic Consequences For Property Rights In This Circuit.

As explained in the Petition for Rehearing:

> [I]t is important to keep in mind precisely what the panel opinion authorizes here — the appropriation without just compensation of almost fifty percent of Petitioners' raisin harvest from 2002-2003 and approximately one-third of the harvest from 2003-2004. (Indeed, without any compensation whatsoever for the 30 percent appropriation in 2003-2004.) If the panel opinion here stands, then USDA may require farmers in innumerable agricultural sectors to hand over fifty percent of their annual crop to the government for access to commercial markets — affecting billions of dollars of commerce.

Pet. 20. In response to these observations, the Government claims that "Plaintiffs' fears" about the panel opinion's consequences for property rights "are considerably overstated." Opp. 17. But the Government fails to dispute that Plaintiffs accurately describe the logical consequences of the panel opinion. It appears that Plaintiffs' "fears" — as described above and in their Petition — are well-founded indeed.

Rather than disputing Plaintiffs' observations about the panel opinion's logical consequences, the Government argues that, notwithstanding these consequences, this Court may take comfort that courts have "uph[eld] agricultural supply controls under the AMAA against takings challenges." Opp. 17. But the Government cites only a single published opinion (the Federal Court of Claims' 2006 opinion in *Evans*) upholding the Raisin Marketing Order in the face of a Takings Clause challenge,

which makes the panel the first Article III or appellate court to have upheld the Order. As *Evans* explained, the Raisin Marketing Order "stands out from most of its counterparts" and is "stricter." 74 Fed. Cl. at 558, 562. There is, in short, no longstanding line of precedents upholding the Order.

More notably still, even in upholding the Raisin Marketing Order, both this Court and the Federal Court of Claims described the provisions of the Order as "draconian." *Evans*, 74 Fed. Cl. at 555; Op. at 9472. There is thus a general recognition — shared by all, save (it appears) the Government — that the property appropriation the Order imposes on independent raisin farmers, like Plaintiffs, is dramatic and unique. Plaintiffs respectfully submit that such "draconian" results should not be imposed without this Court's having addressed the weighty issues that Plaintiffs have raised in their Petition.

CONCLUSION

For these reasons, this Court should grant panel rehearing or rehearing *en banc*.

Respectfully submitted,

Brian C. Leighton
Attorney at Law
701 Pollasky Avenue
Clovis, CA 93612
(559) 297-6190

/s/ Michael W. McConnell
Michael W. McConnell
Aditya Bamzai

KIRKLAND & ELLIS LLP
655 Fifteenth Street, N.W.
Washington, DC 20005
(202) 879-5000
Counsel for Plaintiffs-Appellants

December 30, 2011

[CERTIFICATE OF COMPLIANCE AND CERTIFICATE OF SERVICE OMITTED]

APPENDIX L

No. 10-15270

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MARVIN D. HORNE AND LAURA R. HORNE, D.B.A. RAISIN VALLEY FARMS, A PARTNERSHIP, AND D.B.A. RAISIN VALLEY FARMS MARKETING ASSOCIATION, A.K.A. RAISIN VALLEY MARKETING, AN UNINCORPORATED ASSOCIATION; MARVIN D. HORNE; LAURA R. HORNE; DON DURBAHN, AND THE ESTATE OF RENA DURBAHN, D.B.A. LASSEN VINEYARDS, A PARTNERSHIP,

Plaintiffs-Appellants,

v.

UNITED STATES DEPARTMENT OF AGRICULTURE,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA
No. 1:08-CV-01549-LJO-SMS

OPPOSITION TO PETITION FOR REHEARING AND REHEARING EN BANC

TONY WEST
Assistant Attorney General

BENJAMIN W. WAGNER
United States Attorney

MICHAEL S. RAAB
KELSI BROWN CORKRAN
(202) 514-3159
Attorneys, Appellate Staff
Civil Division, Room 7216
950 Pennsylvania Ave., NW
Washington, DC 20530

[TABLE OF CONTENTS AND TABLE OF AUTHORITIES OMITTED]

INTRODUCTION AND SUMMARY

The Agricultural Marketing Agreement Act of 1937 ("AMAA"), 7 U.S.C. §§ 601 et seq., was enacted during the Depression, with the objective of helping farmers obtain a fair value for their products. *See Pescosolido v. Block*, 765 F.2d 827, 828 (9th Cir. 1985); 7 U.S.C. § 602 (2000). The AMAA

"contemplates a cooperative venture" among the Secretary of Agriculture, farmers, and the "handlers" who market agricultural goods, "the principal purposes of which are to raise the price of agricultural products and to establish an orderly system for marketing them." *Block v. Community Nutrition Inst.*, 467 U.S. 340, 346 (1984). To achieve these goals, the Secretary promulgates "marketing orders" that regulate the sale of commodities that are particularly vulnerable to market fluctuations. The marketing order for raisins was issued in 1949, following a spike in production that resulted in a price drop from $235 per ton to $40-$60 per ton. *See* Op. 9461 n.7. The order stabilizes prices by providing for the establishment of annual reserve pools, determined by each year's crop yield, thus decreasing the supply of raisins on the open domestic market. *See* 7 U.S.C. § 608c(6)(E); 7 C.F.R. §§ 989.54(d), 989.65.

The marketing order regulates "handlers" of California raisins — i.e., the entities that process raisins for market distribution. Under the order, handlers set aside a "reserve pool" that may not be sold on the open domestic market. The reserve the Secretary. *See* 7 C.F.R. §§ 989.26, 989.29, 989.30. Every year, the committee reviews the crop yield and recommends to the Secretary what portion should be withheld from the open market. *See id.* §§ 989.54(d), 989.65. If the recommendation is approved by two-thirds of farmers (or by the farmers who produced two-thirds of the crop) and the handlers of at least fifty percent of the crop, the Secretary promulgates a regulation fixing the percentage of "reserve" raisins for that year. 7 U.S.C. §§ 608c(8), (9)(B)(i)-(ii); 7 C.F.R. §§ 989.55, 989.65. All reserve raisins are

delivered to the committee, which may then sell them in secondary, non-competitive markets. *See* 7 C.F.R. §§ 989.65, 989.66(a), (b)(1), (b)(4). Farmers receive direct payment, at a pre-negotiated field market price, for the raisins made available for sale on the open market. *See Lion Raisins, Inc. v. United States*, 416 F.3d 1356, 1360 (Fed. Cir. 2005). For the reserve raisins, farmers receive an equity interest which entitles them to an equitable distribution of the net proceeds from the reserve pool sales. *See* 7 C.F.R. § 989.66(h).

In 2002, plaintiffs undertook a production scheme that they believed would allow them to sell raisins without becoming "handlers" subject to the marketing order, thus side-stepping the regulatory framework described above. Disagreeing with plaintiffs' characterization of their business, the Administrator of the United States Department of Agriculture ("USDA") Agricultural Marketing Service initiated an enforcement action against plaintiffs, alleging numerous statutory and regulatory violations. Plaintiffs were found liable for, among other things, failing to comply with the reserve requirements, and ordered to pay over $600,000 in fines and assessments. *See* Op. 9464-65.

Plaintiffs filed suit in the United States District Court for the Eastern District of California, seeking review of the agency's final decision pursuant to 7 U.S.C. § 608c(15)(B). Plaintiffs argued that the agency erred in concluding that plaintiffs were "handlers" subject to the AMAA and raisin marketing order. Plaintiffs also argued that the imposed fines violated the Eighth Amendment, and that the raisin reserve requirement constitutes a per

se, physical taking of property without just compensation, in violation of the Fifth Amendment.

The district court granted summary judgment in favor of the government, and a unanimous panel of this Court affirmed. Plaintiffs now seek rehearing with respect to the panel's rejection of their Takings Clause claim.

The panel's decision sets forth the narrow and correct holding that the raisin reserve program did not subject plaintiffs to a "physical, per se taking" for which they are automatically entitled to compensation.

Although not before the panel, a serious jurisdictional problem exists with respect to plaintiffs' taking claim which at the very least counsels against rehearing en banc. Where, as here, the individual asserting a government taking may seek compensation under the Tucker Act, the claim must be brought in the Court of Federal Claims in the first instance.

Plaintiffs have also failed to identify any basis for reconsidering the panel's decision on the merits. Plaintiffs' petition turns almost entirely on their assertion that their claim is controlled by the "per se, physical taking" rule announced in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). In so arguing, plaintiffs gloss over crucial differences between this case and *Loretto*, which involved the permanent physical occupation of land owned by the plaintiff. Neither the Supreme Court nor this Court nor any other court of appeals has suggested that a physical, per se taking may be found with regard to personal property that the

government never attempted to physically possess, and for which the plaintiff had no historically rooted expectation of an unfettered property right. Moreover, more recent Supreme Court decisions make clear that the *Loretto* rule does *not* apply to regulations that condition particular uses of private property on the transfer of some portion of that property to the government. And the panel's decision is consistent with over seventy years of federal court decisions rejecting takings challenges to the agricultural supply controls promulgated under the AMAA, including a recent decision by the Court of Federal Claims reaching exactly the same conclusion as the panel with regard to the raisin reserve requirement, *see Evans v. United States*, 74 Fed. Cl. 554 (2006).

Finally, plaintiffs have failed to explain why the raisin marketing order effectuates an unconstitutional taking when the order is promulgated (and approved by a vote of producers and handlers) for the express purpose of *increasing* the amount of money plaintiffs and other raisin farmers receive for their products.

ARGUMENT

In general, whether a regulatory requirement constitutes a compensable taking turns on a fact-intensive inquiry considering (1) the economic impact of the regulation on the claimant; (2) the extent to which the regulation interferes with reasonable investment-backed expectations; and (3) the character of the governmental action. *See Penn Cent. Transp. Co. v. N.Y.C.*, 438 U.S. 104, 124 (1978). *Plaintiffs have not attempted to demonstrate a*

regulatory taking pursuant to these factors. Instead, plaintiffs argue that the raisin reserve program should be deemed a "per se, physical" taking pursuant to the Supreme Court's decision in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), categorically entitling them to compensation regardless of the factors above. This Court correctly rejected that argument, and plaintiffs have provided no basis for rehearing of that decision.

The USDA has not physically taken or attempted to physically take plaintiffs' raisins, and has no plans to physically take plaintiffs' raisins in the future. Plaintiffs' suit challenges the USDA's imposition of fines based on plaintiffs' failure to comply with the regulatory scheme controlling the sale of California raisins on the open domestic market. Plaintiffs are free to challenge that regulatory scheme as unconstitutional under the Takings Clause, but they misunderstand how such a challenge should proceed and the manner in which it must be analyzed.

As an initial matter, it is does not appear that plaintiffs have asserted a takings claim that this Court has jurisdiction to adjudicate. The Supreme Court has explained that the Fifth Amendment does not prohibit the government from taking private personal property, but instead "places a condition on the exercise of that power," *First English Evangelical Lutheran Church of Glendale v. Los Angeles Co.*, 482 U.S. 304, 314 (1987), namely that the government "provide[] an adequate process for obtaining compensation," *Williamson Co. Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 194 (1985). Congress has provided that compensation process through the Tucker Act, 28 U.S.C. § 1491, which

allows parties to bring suit seeking compensation from the government for a taking in the United States Court of Federal Claims. *See Ruckleshaus v. Monsanto Co.*, 467 U.S. 986, 1016 (1984). Accordingly, a takings claim "must be brought to the Court of Federal Claims in the first instance, unless Congress has withdrawn the Tucker Act grant of jurisdiction in the relevant statute." *Eastern Enterprises v. Apfel*, 524 U.S. 498, 520 (1998) (plurality opinion).

Nothing in the AMAA precludes a Tucker Act claim for an alleged taking under a marketing order, and plaintiffs therefore "clearly are entitled" to bring such a claim. *Bay View, Inc. v. Ahtna, Inc.*, 105 F.3d 1281, 1285 (9th Cir. 1997); *see also Preseault v. Interstate Commerce Comm'n*, 494 U.S. 1, 12 (1990). Where, as here, the complaining party may seek compensation for the alleged taking pursuant to the Tucker Act, "[a] takings claim is premature until the plaintiffs have exhausted their rights under [that] Act. This restriction is jurisdictional. The simple fact is that we have no jurisdiction to address the merits of takings claims where Congress has provided a means for paying compensation for any taking that might have occurred." *Consejo de Desarrollo Economico de Mexicali v. United States*, 482 F.3d 1157, 1172 (9th Cir. 2007) (internal quotation omitted); see also *Gordon v. Norton*, 322 F.3d 1213 (10th Cir. 2003).

Plaintiffs contend that their refusal to comply with the regulatory scheme was justified as a "self help" measure against an unconstitutional taking of their property. Appellants' Br. 6. As just explained, however, the government does not violate the Fifth

Amendment when it takes private property, so long as it provides a process for obtaining just compensation. If plaintiffs believed that their compliance with the raisin marketing order would result in a taking of their property, their recourse was to seek compensation for that taking in the Court of Federal Claims.

Indeed, the Court of Federal Claims already adjudicated exactly such a claim in *Evans v. United States*, 74 Fed. Cl. 554 (Ct. Fed. Cl. 2006). To be sure, plaintiffs might prefer to avoid Evans' holding that the raisin reserve requirement should be analyzed as a regulatory taking rather than a per se taking. But plaintiffs cannot properly ask this Court to decide the hypothetical question whether the raisin marketing order would amount to an unconstitutional taking were it not compensable under the Tucker Act. This Court has "no authority" to speculate about such matters. *See Bay View*, 105 F.3d at 1286.

Although this jurisdictional issue was not presented to the panel, it is "well-established . . . that the parties may not waive subject-matter jurisdiction and that, therefore, such a claim may be raised at any point in the litigation." *Escobar Ruiz v. INS*, 813 F.2d 283, 286 n.3 (9th Cir. 1987); *see also, e.g., Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 93 (1998). At the very least, this issue counsels strongly against rehearing en banc of the merits question raised in plaintiffs' petition.

As the panel unanimously recognized, plaintiffs' takings argument also fails on the merits. The centerpiece of plaintiffs' petition is that the panel did not correctly apply the standard for per se, physical

takings announced in *Loretto*. The plaintiff in *Loretto* challenged a law requiring a landlord to permit cable companies to install facilities on rental buildings. *See* 458 U.S. at 423. Under these circumstances, the Supreme Court held, "[the] permanent physical occupation [of plaintiff's building] is a government action of such a unique character that it is a taking without regard to other factors that a court might ordinarily examine." *Id.* At 432.

Plaintiffs' argument for rehearing turns entirely on their characterization of the *Loretto* rule as a "categorical holding regarding physical takings" that applies to their claim. Pet. 14. But *Loretto* involved the permanent physical occupation of an indivisible piece of land to which the plaintiff had title. Describing its decision as "very narrow," the Court specifically tied its holding to the "historically rooted expectation" that property owners have an exclusive right to occupy their land, and that any interference with that right will be compensated. *Loretto*, 458 U.S. at 441; *see also, e.g.*, *id.* at 430 n.7 ("Early commentators viewed a physical occupation of real property as the quintessential deprivation of property."); *id.* at 427 ("When faced with a constitutional challenge to a permanent physical occupation of real property, this Court has invariably found a taking."). Neither *Loretto*'s language nor its reasoning governs this case.

First, plaintiffs' assertion of a "permanent physical occupation" strains the phrase beyond its meaning. Even if the government had actually taken title to plaintiffs' raisins, the government would not have "physically occup[ied]" the raisins. *See* Black's Law

Dictionary 1184 (9th ed. 2009) (defining "occupation" as "the possession, control, or use of real property"). Given that plaintiffs *kept* the raisins at issue, they cannot possibly claim that their challenge is to a permanent, physical occupation within the meaning of *Loretto*. At most, they seek an extension of *Loretto* to their claim, based on the fact that the raisins are physical property. But such an extension would make no sense in a case where the plaintiffs cannot demonstrate that the government actually attempted to take their property without compensation. Plaintiffs in this case challenge a fine they incurred because they sold their raisins on the open domestic market without complying with the applicable regulatory regime. Plaintiffs cannot demonstrate that they are owed compensation for a physical taking, because no physical taking ever occurred. And they cannot demonstrate that they lawfully resisted an unconstitutional taking, because the Tucker Act provided plaintiffs with a vehicle for obtaining any compensation to which they may have been entitled, had they complied with the regulatory regime.

Moreover, even if plaintiffs had presented this Court with a claim for an actual taking of their physical property without compensation, an extension of *Loretto* would be inappropriate because plaintiffs cannot demonstrate any "historically rooted expectation of compensation" for the conduct they challenge. *Loretto*, 458 U.S. at 441. As the Supreme Court explained in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1027 (1992), takings jurisprudence is "guided by the understandings of our citizens regarding the content of, and the State's power over, the 'bundle of rights' that they acquire

when they obtain title to property." The Court has specifically recognized "the State's traditionally high degree of control over commercial dealings" involving personal property, *id.* at 1027, an observation that is nowhere more apt than in the context of agricultural commodities. The government's extensive use of price and supply controls to stabilize particular agricultural markets dates back to the Depression, and the raisin marketing order itself has been in place for over sixty years. *See* Op. 9458, 9461. Plaintiffs could not have entered the raisin industry with the expectation that they would be able to freely market their raisins without regard to this regulatory regime, and they certainly could not have expected that they would be able to enjoy the artificially inflated prices created by the raisin reserve program without participating in that program themselves.

Plaintiffs do not cite a single Supreme Court or Ninth Circuit case applying the *Loretto* rule to personal property, let alone to personal property that the government never attempted to possess, and for which the plaintiff had no reasonable expectation of an unfettered property right. Although some other courts of appeals have found particular personal property takings to constitute "physical, per se takings," they have only done so in cases that arguably fit within *Loretto*'s reasoning and language. In *Nixon* v. United States, 978 F.2d 1269 (D.C. Cir. 1992), for example, the D.C. Circuit agreed with former President *Nixon* that the government's possession of his presidential papers constituted a per se, physical taking. In so holding, the court of appeals did not hold that all personal property falls under the *Loretto* rule, but that the rule need not "be

limited to real property." *Id.* at 1285. In President *Nixon*'s case, the government had actually taken "complete possession" of his papers, *id.* at 1271 (internal quotation omitted), contrary to the expectation "since the beginning of the Republic," that a President's papers are his private property, *id.* at 1276-84.

Likewise, in *Gulf Power Co. v. United States*, 187 F.3d 1324 (11th Cir. 1999), the Eleventh Circuit applied *Loretto* to a statute requiring utility companies to provide cable companies with access to their telephone poles and related facilities. The court of appeals explained that under the applicable statute, "a utility has no choice but to permit a cable company or telecommunication carrier to permanently occupy physical space on its poles, ducts, conduits, and rights-of-way." *Id.* at 1328. "Such a permanent, physical occupation of property," the court concluded, "falls squarely within the *Loretto* rule." *Id.* at 1329. The court also noted that although the utilities' use of their poles, ducts, and conduits had always been highly regulated, the mandatory access provisions were new. *Id.* at 1326-27, 1330. The court explained that "the fact that property was taken for a public use to begin with does not mean that it may be taken again for another public use without the payment of just compensation to its owner." *Id.* at 1329.

Gulf Power does not "squarely conflict," Pet. 13, or even obliquely conflict, with the panel's decision in this case. Plaintiffs here challenge a fine that was imposed on them because they sold raisins on the open domestic market without complying with a regulatory scheme that has been in place for over

sixty years. In contrast to *Nixon* and *Gulf Power*, the government did not "occupy" or even attempt to take plaintiffs' property, and the fines that the government imposed were fully consistent with historical expectations.

Plaintiffs also assert a conflict with *Hall v. City of Santa Barbara*, 833 F.2d 1270 (9th Cir. 1987). *Hall*, however, was expressly abrogated by the Supreme Court in *Yee v. City of Escondido*, 503 U.S. 519 (1992). This Court held in *Hall* that an ordinance requiring owners of mobile home parks to give unending leases to tenants constituted a physical taking of their property. *Hall*, 833 F.2d at 1276. Plaintiffs cite *Hall* for the proposition that a taking may be "per se" even if the property owner can avoid it by "'going out of business,'" and then plaintiffs suggest that the decision was "abrogated on other grounds." Pet. 13-14 (quoting *Hall*, 833 F.2d at 1277-78). But that holding is exactly what the Supreme Court rejected in *Yee*. As the Supreme Court explained, the *Yees* "relied almost entirely on *Hall* . . . which had held that a similar mobile home rent control ordinance effected a physical taking." *Yee*, 503 U.S. at 525. The Court held, however, that, contrary to *Hall*, an ordinance of this sort did *not* constitute a physical taking, because it was conditioned on the choice to enter a particular market. The Court explained that "[t]he government effects a physical taking only where it *requires* the landowner to submit to the physical occupation of his land." *Id.* at 527-29.

Plaintiffs' request for rehearing should be denied not only because they fail to identify any way in which the panel's decision conflicts with Supreme

Court or court of appeals precedent, but also because the legal rule that they advocate has already been rejected by the Supreme Court. Plaintiffs' position is that because the raisin marketing order hinges their ability to sell raisins on their participation in the raisin reserve program, the order effectuates a "direct appropriation" of their property by the government. From their perspective, the regulatory regime is no different than the government "com[ing] onto the Hornes' farm uninvited and walk[ing] off with forty-seven percent of their crops." Op. 9469-70; Pet. 10. But the Supreme Court has made clear that this distinction is of enormous significance. In *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987), the plaintiffs challenged a decision by the California Coastal Commission to grant the plaintiffs permission to rebuild their house only if they transferred to the public an easement across their beachfront property. Although the easement would have resulted in a direct transfer of property, the Court did not treat it as a per se, physical taking under *Loretto*. Instead, the Court analyzed the easement as a type of regulatory taking, entitling the plaintiffs to compensation only because there was no "essential nexus" between the easement and the building permit. The Court noted that "[h]ad California simply required the *Nollans* to make an easement across their beachfront available to the public on a permanent basis in order to increase public access to the beach, rather than conditioning their permit to rebuild their house on their agreeing to do so, we have no doubt there would have been a taking." *Id.* at 831. However, because the Commission instead required the easement as part of

a "land-use regulation," *id.* At 834, the Court engaged in a more searching inquiry of its purposes.

Likewise, in *Dolan v. City of Tigard,* 512 U.S. 374 (1994), the Court declined to apply the *Loretto* rule to a city ordinance that conditioned approval of the plaintiff's building permit on a dedication of a portion of her property to a public greenway and bike path. *Id.* at 387. Similar to *Nollan*, the Court noted that "had the city simply required petitioner to dedicate a strip of land . . . for public use, rather than conditioning the grant of her permit to redevelop her property on such a dedication," the taking would have been unquestionable. *Id.* at 384. But, because the land transfer was instead a conditional regulatory requirement, whether or not it constituted a compensable taking turned on whether "the required dedication [was] related both in nature and extent to the impact of the proposed development." *Id.* At 391.

Nollan and *Dolan* make clear the analytical distinction between a direct appropriation of physical property and a regulation that conditions particular uses of private property on the transfer of some portion of that property to the government. While either type of action may constitute a taking entitling the property owner to compensation, only a direct appropriation of property triggers the per se, physical taking rule announced in *Loretto.*

Although they have identified no actually conflicting decision of the Supreme Court or any court of appeals, plaintiffs contend that the panel has authorized an unprecedented intrusion into the commercial activities of business owners, with "sweeping ramifications for the stability of property

rights within this Circuit." Pet. 21. Plaintiffs' fears are considerably overstated, particularly given the longstanding consistency of the federal courts in upholding agricultural supply controls under the AMAA against takings challenges.

Indeed, this Court rejected a virtually identical takings claim over seventy years ago in *Wallace v. Hudson-Duncan*, 98 F.2d 985 (9th Cir. 1938). The plaintiff in Wallace challenged the walnut marketing order's requirement that producers contribute a percentage of their walnuts to a control board or provide economic consideration in lieu of such walnuts as a condition for selling walnuts in interstate commerce. *Id.* at 987. This Court rejected the plaintiff's takings claim, holding that the marketing order did not effectuate a "direct appropriation" of the plaintiff's property, but instead was a regulatory condition. *Id.* at 989. Every federal court to consider the issue since then has also rejected the notion that the price and supply controls promulgated under the AMAA implicate the Fifth Amendment. *See, e.g., Cal-Almond, Inc. v. United States*, 30 Fed. Cl. 244, 247 (1994); *Carruth v. United States*, 627 F.2d 1068, 1081 (Ct. Cl. 1980). The panel's decision in this case is modest by comparison, holding only that plaintiffs failed to demonstrate a "per se" taking, while leaving open the possibility that the raisin marketing order effectuates a compensable regulatory taking. Far from revolutionary, this is exactly the same conclusion reached by the Court of Federal Claims five years ago in *Evans v. United States*, 74 Fed. Cl. 554 (2006).

A final point counseling against rehearing is plaintiffs' failure to put forth any evidence or

explanation as to how the raisin reserve requirement has a negative financial impact on their business. Plaintiffs cannot substantiate their claim of an unconstitutional taking without demonstrating that the raisin reserve program causes them financial loss. *See Brown v. Legal Foundation of Washington*, 538 U.S. 216, 235-36 (2003). As the panel noted, it likely would be quite difficult for plaintiffs to gather such evidence, "given that the reserve-pool restrictions on the market supply of raisins serve to *raise* prices for [plaintiffs'] free-tonnage raisins, ostensibly making their business more profitable than it would be in an unregulated free market." Op. 9475. Plaintiffs sought to enjoy the higher prices resulting from that regulatory regime without bearing any of the burdens that go along with the benefits of the raisin price support program. Plaintiffs may wish to circumvent the system, but they cannot demonstrate that the government engaged in a "per se, physical taking" when it fined them for doing so.

CONCLUSION

For the foregoing reasons, this Court should deny the petition for rehearing or rehearing en banc.

Respectfully submitted,

TONY WEST
Assistant Attorney General

BENJAMIN W. WAGNER
United States Attorney

MICHAEL S. RAAB
KELSI BROWN CORKRAN
(202) 514-3159
Attorneys, Appellate Staff
Civil Division, Room 7216
950 Pennsylvania Ave., NW
Washington, DC 20530

[CERTIFICATE OF COMPLIANCE AND CERTIFICATE OF SERVICE OMITTED]

APPENDIX M

No. 10-15270

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MARVIN D. HORNE AND LAURA R. HORNE, D.B.A. RAISIN VALLEY FARMS, A PARTNERSHIP, AND D.B.A. RAISIN VALLEY FARMS MARKETING ASSOCIATION, A.K.A. RAISIN VALLEY MARKETING, AN UNINCORPORATED ASSOCIATION; MARVIN D. HORNE; LAURA R. HORNE; DON DURBAHN, AND THE ESTATE OF RENA DURBAHN, D.B.A. LASSEN VINEYARDS, A PARTNERSHIP,

Plaintiffs-Appellants,

v.

UNITED STATES DEPARTMENT OF AGRICULTURE,

Defendant-Appellee.

On Appeal from the United States District Court
for the Eastern District of California (O'Neill, J.)
Civil Action No. 1:08-cv-01549-LJO-SMS

PETITION FOR PANEL REHEARING OR REHEARING *EN BANC*

Brian C. Leighton
Attorney at Law

701 Pollasky Avenue
Clovis, CA 93612
(559) 297-6190

Michael W. McConnell
Aditya Bamzai
KIRKLAND & ELLIS LLP
655 Fifteenth Street, N.W.
Washington, DC 20005
(202) 879-5000
Counsel for Plaintiffs-Appellants

September 8, 2011

[TABLE OF CONTENTS AND
TABLE OF AUTHORITIES OMITTED]

INTRODUCTION

This case presents the important question whether the federal government may — without complying with the just compensation requirement of the Fifth Amendment to the United States Constitution — physically take a substantial percentage of a farmer's annual raisin crop as a condition for the farmer receiving permission to sell the remainder of his crop on the market.

Under federal Department of Agriculture ("USDA") regulations, "handlers" of raisins are required on a yearly basis to set aside a portion of their raisin crop — known as "reserve-tonnage" raisins — "for the account" of a committee established by the Department. The committee, known as the Raisin Administrative Committee ("RAC"), then (1) disposes

of the reserve-tonnage raisins as it sees fit — often by setting them aside to be sold at a price below the cost of production to the federal government for school lunch and other nutritional programs — and (2) sets compensation for producers as it sees fit. In the two years relevant to this case (2002-2003 and 2003-2004), federal law required handlers to set aside 47 percent and 30 percent of the producer's crop, respectively, as reserve-tonnage raisins. For the 2003-2004 year, the RAC has to this date determined that compensation for reserve-tonnage raisins should be set at precisely zero dollars — *i.e.*, producers are to receive no compensation for the USDA's appropriation of almost one-third of their crop. For the 2002-2003 year, the RAC set a compensation price that is below the cost of producing raisins.

The Takings Clause of the Fifth Amendment to the U.S. Constitution provides that private property shall not "be taken for public use, without just compensation." U.S. Const. amend. V. At its uncontroversial core, the Clause categorically requires just compensation for a permanent physical "invasion" or "occupation" of property, however minor that invasion may be, *see Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), and guarantees compensation not only for the taking of real property, but also personal property, *see Phillips v. Wash. Legal Found.*, 524 U.S. 156 (1998). There is no dispute here that the raisins are personal property under applicable law.

The panel in this case nevertheless failed to invalidate the Raisin Marketing Order because it determined that no physical taking occurs under the

regulatory scheme — and that no compensation is required — when "the Raisin Marketing Order applies to the Hornes only insofar as they voluntarily choose to send their raisins into the stream of interstate commerce." Panel Op. (hereafter, "Op.") at 9470 (attached at Tab A). The United States Supreme Court has squarely rejected this very argument. In *Loretto*, the Court held that a cable installation pursuant to a New York law providing that a landlord must permit a cable television company to install its cable facilities upon private property was a physical taking for which just compensation is due under the Fifth Amendment. *See* 458 U.S. at 421. In seeking to defend the law at stake in *Loretto*, the cable company argued that no physical taking had occurred because "the law applies only to buildings used as rental property" and is therefore "simply a permissible regulation of the use of real property." *Id.* at 438-39. Justice Marshall, writing for the Court, flatly rejected this claim:

> It is true that the landlord could avoid the requirements of § 828 by ceasing to rent the building to tenants. But a landlord's ability to rent his property may not be conditioned on his forfeiting the right to compensation for a physical occupation. [Defendant's] broad "use-dependency" argument proves too much. For example it would allow the government to require a landlord to devote a substantial portion of his building to vending and washing machines, with all the profits to be retained by the owners of these services

> and with no compensation for the deprivation of space. It would even allow the government to requisition a certain number of apartments as permanent government offices. The right of a property owner to exclude a stranger's physical occupation of his land cannot be so easily manipulated.

Id. at 439 n.17. The Court notably did not characterize the taking at stake in *Loretto* as a regulatory taking simply because a commercial landlord could avoid the regulation by ceasing to rent his property.

The same analysis applies here. The regulation requiring Petitioners to turn over 47 percent and 30 percent of their property "for the account of" a government committee cannot be recharacterized as a regulatory taking simply because a farmer may supposedly avoid the regulation by ceasing to sell his raisins. The holding in *Loretto* is squarely on point and contradicts the panel's holding. This case thus falls within the uncontroversial core of the Takings Clause. It does not involve regulations that merely control the use of a person's property and thereby reduce its value, as in the Supreme Court's "regulatory takings" cases. It is not even a "physical occupation" case, where the government's agent enters the land, but the owner is otherwise free to enjoy all the other sticks in the bundle of property ownership. Instead, the government takes title to Petitioners' property and uses it for governmental purposes, such as school lunches, without any pretense of providing the constitutionally mandated

compensation. This case cries out for rehearing, either by the panel or the *en banc* Court.

BACKGROUND

A. The Agricultural Marketing Agreement Act of 1937 and the Raisin Marketing Order.

Under the Depression-era Agricultural Marketing Agreement Act of 1937, as amended, 7 U.S.C. § 601 *et seq.* ("AMAA"), USDA heavily regulates certain segments of California's agricultural economy, including the raisin industry. Pursuant to the Act, USDA promulgated the Marketing Order Regulating the Handling of Raisins Produced from Grapes Grown in California. *See* 7 C.F.R. Part 989 ("Raisin Marketing Order" or "the Order"). The Order, which was first adopted in 1949, establishes a food product reserve program.

The Department has promulgated marketing orders for other agricultural products, such as walnuts, almonds, prunes, tart cherries, and spearmint. *See Evans v. United States*, 74 Fed. Cl. 554, 558 (2006) (collecting orders). The Raisin Marketing Order, however, is different from these other marketing orders in two crucial respects: "it effects a direct transfer of title of a producer's 'reserve tonnage' raisins to the government, and it requires physical segregation of the reserve-tonnage raisins held for the government's account." *Id.*; *see also* 7 C.F.R. §§ 989.54, 989.55, 989.65, 989.66.

Under the Order, the RAC and USDA must establish certain raisin tonnage requirements, known as "reserve-tonnage" and "free-tonnage"

percentages, which vary from year to year. *Id.* §§ 989.66, 989.166. The percentages are established by (and thus unknown to raisin producers until) February 15 of each crop year, much after producers have expended substantial resources for the production and harvest of their crop for the year. *Id.* §§ 989.21, 989.54(d). Once the percentages are set, "handlers" of raisins must set aside the "reserve-tonnage" requirement "for the account" of the RAC. *Id.* §§ 989.65, 989.66(a), (b)(1), (4). The RAC may require the delivery of the reserve-tonnage raisins to anyone chosen by the RAC to receive them. See id. § 989.66(b)(4). Or the RAC may sell reserve-tonnage raisins to handlers for resale in export markets, *see id.* §§ 989.67(c)-(e), or it may simply direct that they be sold or disposed of by direct sale or gift to United States agencies, *see id.* § 989.67(b)(2), foreign governments, *see id.* § 989.67(b)(3), or charitable organizations, *see id.* § 989.67(b)(4).

B. Petitioners and the 2002-2003 and 2003-2004 Raisin Crops.

Marvin and Laura Horne are farmers. They are part of the large raisin industry in California, which produces 99.4 percent of the United States' and 40 percent of the world's raisin crop. Since 1969, they have produced raisins in Fresno and Madera Counties in California. They operate Raisin Valley Farms, a California general partnership, and the Raisin Valley Farms Marketing Association, a California unincorporated association. Along with Laura Horne's father, Don Durbahn, and the Estate of Rena Durbahn, they also operate Lassen Vineyards, a California general partnership.

Believing themselves not to be "handlers" subject to the Raisin Marketing Order and AMAA, Petitioners did not set aside the reserve-tonnage requirement for 2002-2003 and 2003-2004, the two years relevant to this case. In those two years, USDA required farmers like Petitioners to turn over 47 percent and 33 percent of their raisin crop. *See* http://www.raisins.org/Newsletter/2000_ANNUAL_REPORT/Table10.pdf. Through the reserve-tonnage set-aside, the government obtained, respectively, 22.1 million and 38.5 million pounds of raisins for its own programs in those years alone. *See* http://www.raisins.org/Newsletter/2000_ANNUAL_REPORT/Table06.pdf.

C. Procedural History.

On April 1, 2004, the Administrator of the Agricultural Marketing Service initiated an enforcement action against Petitioners, claiming that they had violated the AMAA by purportedly failing to comply with the Raisin Marketing Order's various requirements. According to the USDA, Petitioners, who are producers of raisins, became "handlers" subject to the reserve requirements upon their marketing of their own produced raisins. An Administrative Law Judge in the USDA agreed. On appeal from that decision, a USDA Judicial Officer found Petitioners liable for various regulatory violations. Of particular relevance here, the Judicial Officer determined that Petitioners violated 7 C.F.R. § 989.66 and 7 C.F.R. § 989.166 by failing to hold reserve raisins for the 2002-2003 and 2003-2004 crop years.

The Judicial Officer then ordered certain forfeitures and penalties for Petitioners' failure to acquiesce in the USDA's taking of their property. Specifically, the Judicial Officer ordered Petitioners to pay $483,843.53, the alleged dollar equivalent of the withheld raisin reserve contributions for the 2002-2003 (632,427 pounds) and 2003-2004 (611,159 pounds) crop years, as determined by the "field price" typically paid to producers for free-tonnage raisins in those years. 7 C.F.R. § 989.54(b) . The JO also ordered Petitioners to pay $8,783.39 in unpaid assessments pursuant to 7 C.F.R. § 989.80(a), and an additional $202,600 in civil penalties pursuant to 7 U.S.C. § 608c(14)(B).

Petitioners filed this action in district court seeking judicial review of a final agency decision pursuant to 7 U.S.C. § 608c. Petitioners challenged USDA's imposition of civil forfeitures, penalties, and assessments for their failure to comply with the reserve requirements, among the other asserted regulatory infractions, contending in relevant part that the requirement that they contribute a specified percentage of their annual raisin crop to the government-controlled reserve pool is an uncompensated *per se* taking in violation of the Fifth Amendment. Petitioners also argued that (1) they are producers, not handlers, subject to the Raisin Marketing Order; and (2) the penalties imposed upon them violate the Eighth Amendment's Excessive Fines Clause. The district court granted summary judgment for the USDA. *See Horne v. Dep't of Agriculture*, No. CV-F-08-1549, 2009 WL 4895362 (E.D. Cal. Dec. 11, 2009).

Petitioners appealed, but on July 25, 2011, a panel of this Court affirmed the judgment in its entirety. In doing so, the panel admitted that the argument that a farmer must receive just compensation for a government appropriation of raisins "has some understandable appeal." Op. at 9469. The panel recognized that the "raisins are personal property, personal property is protected by the Fifth Amendment, and each year the RAC 'takes' some of their raisins, at least in the colloquial sense." *Id.* And the panel acknowledged that "the government could [not] come onto the Hornes' farm uninvited and walk off with forty-seven percent of their crops without offering just compensation." *Id.* at 9469-70. The panel nevertheless concluded that USDA "did not authorize a forced seizure of forty-seven percent of the Hornes' 2002-03 crops and thirty percent of their 2003-04 crops, but rather imposed a condition on the Hornes' use of their crops by regulating their sale." *Id.* at 9470. This timely petition follows.

ARGUMENT

REHEARING IS WARRANTED BECAUSE THE PANEL OPINION CONFLICTS WITH BINDING PRECEDENT ON IMPORTANT QUESTIONS OF LAW.

It is well-settled that a "minor but permanent physical occupation of an owner's property authorized by government constitutes a 'taking' of property for which just compensation is due under the Fifth [Amendment]." *Loretto*, 458 U.S. at 421. The panel opinion affirming the grant of summary judgment in the government's favor turns this principle of takings law on its head. The panel

attempts to shoehorn this case into the forgiving constitutional test applicable to regulatory takings, which applies when regulations limit a property owner's use of his or her property. But this is not a regulatory takings case. It is an out-and-out compelled transfer of ownership. The government demands that raisin producers give a government committee ownership over a hefty proportion of the producers' crop, and the committee uses the raisins for its own purposes (such as for federal school lunch programs). The Takings Clause was adopted precisely to protect against such compelled transfers of property.

The principles of takings law applicable to this case are straightforward and uncontroversial. "[A] permanent physical occupation authorized by government is a taking without regard to the public interests that it may serve." *Loretto*, 458 U.S. at 426. That principle applies with equal force where a property owner could avoid the taking by ceasing to rent (or sell) his property, because an owner's ability to sell property "may not be conditioned on his forfeiting the right to compensation for a physical occupation." *Id.* at 439 n.17. By contrast, when the government merely regulates the use of property, compensation is required only if the purpose of the regulation or the extent to which it deprives the owner of the economic use of the property suggest that the regulation has unfairly singled out the property owner to bear a burden that should be borne by the public as a whole. *See, e.g., Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 123-25 (1978).

For both real and personal property, "possession, control, and disposition are . . . valuable rights that inhere in the property." *Phillips*, 524 U.S. at 170; *Hodel v. Irving*, 481 U.S. 704, 717 (1987); *see also Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 837 (1987) (holding that the Takings Clause protects the right to build on real property from excessive land-use regulation). Even though the government may in some circumstances have the authority to prohibit the sale of personal property, "it is crucial" for the constitutionality of such a prohibition that property owners "retain the rights to *possess* and transport their property." *Andrus v. Allard*, 444 U.S. 51, 66 (1979) (emphasis added).

The Eleventh Circuit's application of these principles in *Gulf Power* is instructive. Like *Loretto*, *Gulf Power* squarely conflicts, and cannot be reconciled, with the panel's reasoning. The Eleventh Circuit rejected the argument that a telecommunications provision did not effect a physical takings because plaintiffs "could avoid the effect of the Act by refraining from using their poles, ducts, conduits, and rights-of-way for wire communications." 187 F.3d at 1331. As the court flatly explained, "this argument is foreclosed by *Loretto*," which holds that "[t]he protection against a permanent, physical occupation of one's property does not hinge on the choice of use for that property." *Id.*

The same result is warranted here, for the same reason. Indeed, a panel of this Court has previously reached the same holding, albeit in a case later abrogated on other grounds by the Supreme Court. *See Hall*, 833 F.2d at 1277-78 (holding that *Loretto*

"gave short shrift" to "the notion that the physical occupation is not permanent" where a property owner can avoid a taking "by going out of business"), *abrogated on other grounds*, *Yee*, 503 U.S. at 525-26.

The panel opinion ignores *Loretto*'s categorical holding regarding *physical* takings, instead analogizing this case to two cases involving *regulatory* takings, *Yee* and *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984). *See* Op. at 9471. According to the panel, *Yee* and *Ruckelshaus* stand for the proposition that property owners have "no physical takings claim" where "they *voluntarily*" engage in activity and "thus acquiesce[] in the regulation not under government compulsion but of their own accord." *Id.* As a result, in the panel's view, because Petitioners voluntarily sell raisins, they have acquiesced in the government's appropriation of half their harvest under *Yee* and *Ruckelshaus*.

But neither case says that. *Yee* did not involve a compelled transfer of ownership to the government, but merely a rent control scheme, which is a classic economic regulation. *See* 503 U.S. at 524-25. The petitioners, owners of a mobile home park, attempted to cast the ordinance as a "physical occupation" on the ground that the renters occupied their land and were the beneficiaries of a wealth transfer. The Supreme Court responded, logically enough, that because the mobile home park owners voluntarily leased space to the renters, they could not claim that the physical occupation was caused by the government. As the Court put it, the rent control ordinance was not a physical taking because, unlike the law in *Loretto*, it did not "*require*[] the landowner to submit to the physical occupation of his land," *id.*

at 527, although "[a] different case would be presented were the statute, on its face or as applied, to compel a landowner over objection to rent his property or to refrain in perpetuity from terminating a tenancy," *id.* at 528. The only governmentally-imposed restriction was the rent control. Here, by contrast, a government agency actually takes title to Petitioners' property and does not pay just compensation for it.

The *Yee* Court's statements that "Petitioners voluntarily rented their land to mobile home owners" and "Petitioners' tenants were invited by petitioners, not forced upon them by the government" thus have no application this case. *Id.* at 527-28. These statements do not purport to give the government free reign over the mobile home park so long as its owners "voluntarily" engaged in the mobile home business. Nothing in *Yee*, for example, suggests that the government could require mobile home park owners to devote some portion of their land to government office space or to free housing for the public. To the contrary, *Yee* not only reaffirmed the holding in *Loretto*, but also reaffirmed the *very language* in footnote 17 of *Loretto* that squarely contradicts the panel's holding. *See id.* at 531-32 (quoting footnote 17 with approval); *see also Cwynar v. City & Cnty. of San Francisco*, 90 Cal. App. 4th 637, 658 (2001) (observing that *Yee* "expressly affirmed" this holding in *Loretto*). As *Yee* explained, "Had the city required such [a physical] occupation, of course, petitioners would have a right to compensation, and the city might then lack the power to condition petitioners' ability to run mobile home parks on their waiver of this right." 503 U.S. at 532.

No less importantly, *Yee*'s statement that a "different case would be presented were the statute . . . to compel a landowner over objection . . . to refrain in perpetuity from terminating a tenancy" makes little sense under the panel's interpretation of the case. Why, under the panel's interpretation, could the government not force mobile park owners to "refrain in perpetuity from terminating a tenancy" given that those owners had voluntarily chosen to engage in the business? The fact that the panel's interpretation of *Yee* creates an internal contradiction within the opinion abundantly confirms that the panel's interpretation is wrong.

Nor does *Ruckelshaus* support the panel's holding. Indeed, no party in *Ruckelshaus* even suggested that the appropriation at issue there — which involved a statute requiring disclosure of a trade secret — was a physical taking. The Court did not mention the concept of physical takings or cite *Loretto*. There is thus no indication that the Court intended to upend the clear holding that it had announced in *Loretto* only two years earlier. To the contrary, *Ruckelshaus* turned upon the Court's holding that "Monsanto could not have had a reasonable, investment-backed expectation that EPA would keep the data confidential," 467 U.S. at 1006, a test that has no application in the context of *per se* takings. *See Loretto*, 458 U.S. at 432; *Palazzolo v. Rhode Island*, 533 U.S. 606, 628 (2001). The Panel's observation that "the Hornes had ample prior notice of the condition before they voluntarily decided to enter the raisin market" is therefore entirely misplaced. Op. at 9472. *Ruckelshaus* is inapposite.

In addition to its mistaken reliance on *Yee* and *Ruckelshaus*, the panel opinion fails to recognize that the proposition that a regulation may deprive an owner of all economically beneficial uses of his personal property does *not* support compelled transfer of personal property from an owner to the government. The panel opinion cites *Andrus* for this proposition *see* Op. at 9473, but *Andrus* says the opposite. In upholding a regulation that prohibited the sale of eagle feathers under an environmental statute (thereby depriving the feathers' owners of their ability to earn any money from those feathers), *Andrus* said that "[t]he regulations challenged here do not compel the surrender of the artifacts, and there is no physical invasion or restraint upon them. Rather a significant restriction has been imposed on one means of disposing of the artifacts." 444 U.S. at 65. The Court's opinion thus upheld the government's ability to prohibit the sale of an article, not the government's ability to appropriate an article for its own use. As the Court emphasized, "it is crucial that appellees retain the rights to *possess* and transport their property." *Id.* at 66 (emphasis added).

By contrast, here, as the panel opinion recognizes, the Department's regulations deprive Petitioners of their right to possess, or to use in any meaningful sense, their own property. Indeed, those regulations require Petitioners to relinquish title of the reserve-tonnage raisins to the RAC — precisely the scenario that the Court in *Andrus* took pains to distinguish. Unlike *Andrus*, this case involves not only a prohibition on sale (of a product, eagle feathers, that no owner makes investments to produce), but a forced transfer of property in whose production

Petitioners, and other raisin farmers, invest millions of dollars.

It is therefore utterly irrelevant that the Raisin Marketing Order "does not deny raisin farmers all economically beneficial use of their raisins," because it allows farmers to keep some portion of their raisin crop in any given year. Op. at 9474. This principle has no application in the context of *per se* takings. As the Supreme Court has explained, "When the government physically takes possession of an interest in property for some public purpose, it has a categorical duty to compensate the former owner, . . . regardless of whether the interest that is taken constitutes an entire parcel or merely a part thereof." *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 322 (2002). That is why courts "do not ask whether a physical appropriation advances a substantial government interest or whether it deprives the owner of all economically valuable use." *Id.* at 323. On this issue, too, the panel opinion ignores directly controlling precedent, relying instead on a strained analogy to cases addressing regulations that reduced the economic value of property. But the panel opinion cites no case allowing the government to "take" a percentage of a person's property in the form of a transfer of title from the person to the government.

At the end of the day, it is important to keep in mind precisely what the panel opinion authorizes here — the appropriation without just compensation of almost fifty percent of Petitioners' raisin harvest from 2002-2003 and approximately one-third of the harvest from 2003-2004. (Indeed, without any

compensation whatsoever for the 30 percent appropriation in 2003-2004.) If the panel opinion here stands, then USDA may require farmers in innumerable agricultural sectors to hand over fifty percent of their annual crop to the government for access to commercial markets — affecting billions of dollars of commerce. Indeed, the panel opinion forthrightly acknowledges that its holding leads to a "seemingly draconian result" for independent farmers such as the Petitioners here. Op. at 9472.

More broadly, the principle announced in the panel opinion has sweeping ramifications for the stability of property rights within this Circuit. Under the panel opinion, almost every physical taking of property can be recharacterized as a regulatory taking, because almost every kind of property is owned for use in some fashion. Thus, under the panel opinion, the government can require a manufacturer of microchips to turn over 50 percent of its manufactured goods for government use, if the manufacturer sells those chips in interstate commerce. The government can require a landlord to turn over half of his real property for use as government office space, if the property is rented. This is precisely the parade of horribles that the Supreme Court sought to avoid by adopting the *per se* physical takings rule in *Loretto*. *See* 458 U.S. at 439 n.17 (rejecting the cable company's argument in part because "[i]t would even allow the government to requisition a certain number of apartments as permanent government offices"). The physical takings doctrine announced in *Loretto* — which is at the very core of the Takings Clause — is all but a dead letter if the Raisin Marketing Order is constitutional and the government may require a

farmer to hand over fifty percent of a crop as an entry fee to participation in the market.

CONCLUSION

For these reasons, this Court should grant panel rehearing or rehearing *en banc*.

Respectfully submitted,

Brian C. Leighton
Attorney at Law
701 Pollasky Avenue
Clovis, CA 93612
(559) 297-6190

/s/ Michael W. McConnell
Michael W. McConnell
Aditya Bamzai
KIRKLAND & ELLIS LLP
655 Fifteenth Street, N.W.
Washington, DC 20005
(202) 879-5000
Counsel for Plaintiffs-Appellants

September 8, 2011

[CERTIFICATE OF COMPLIANCE AND CERTIFICATE OF SERVICE OMITTED]

APPENDIX N

28 U.S.C. § 1491

§ 1491. Claims against United States generally; actions involving Tennessee Valley Authority

(a)(1) The United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort. For the purpose of this paragraph, an express or implied contract with the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, or Exchange Councils of the National Aeronautics and Space Administration shall be considered an express or implied contract with the United States.

(2) To provide an entire remedy and to complete the relief afforded by the judgment, the court may, as an incident of and collateral to any such judgment, issue orders directing restoration to office or position, placement in appropriate duty or retirement status, and correction of applicable records, and such orders may be issued to any appropriate official of the United States. In any case within its jurisdiction, the court shall have the power to remand appropriate

matters to any administrative or executive body or official with such direction as it may deem proper and just. The Court of Federal Claims shall have jurisdiction to render judgment upon any claim by or against, or dispute with, a contractor arising under section 7104(b)(1) of title 41, including a dispute concerning termination of a contract, rights in tangible or intangible property, compliance with cost accounting standards, and other nonmonetary disputes on which a decision of the contracting officer has been issued under section 6 of that Act.

(b)(1) Both the Unites States Court of Federal Claims and the district courts of the United States shall have jurisdiction to render judgment on an action by an interested party objecting to a solicitation by a Federal agency for bids or proposals for a proposed contract or to a proposed award or the award of a contract or any alleged violation of statute or regulation in connection with a procurement or a proposed procurement. Both the United States Court of Federal Claims and the district courts of the United States shall have jurisdiction to entertain such an action without regard to whether suit is instituted before or after the contract is awarded.

(2) To afford relief in such an action, the courts may award any relief that the court considers proper, including declaratory and injunctive relief except that any monetary relief shall be limited to bid preparation and proposal costs.

(3) In exercising jurisdiction under this subsection, the courts shall give due regard to the interests of

national defense and national security and the need for expeditious resolution of the action.

(4) In any action under this subsection, the courts shall review the agency's decision pursuant to the standards set forth in section 706 of title 5.

(5) If an interested party who is a member of the private sector commences an action described in paragraph (1) with respect to a public-private competition conducted under Office of Management and Budget Circular A-76 regarding the performance of an activity or function of a Federal agency, or a decision to convert a function performed by Federal employees to private sector performance without a competition under Office of Management and Budget Circular A-76, then an interested party described in section 3551(2)(B) of title 31 shall be entitled to intervene in that action.

(6) Jurisdiction over any action described in paragraph (1) arising out of a maritime contract, or a solicitation for a proposed maritime contract, shall be governed by this section and shall not be subject to the jurisdiction of the district courts of the United States under the Suits in Admiralty Act (chapter 309 of title 46) or the Public Vessels Act (chapter 311 of title 46).

(c) Nothing herein shall be construed to give the United States Court of Federal Claims jurisdiction of any civil action within the exclusive jurisdiction of the Court of International Trade, or of any action against, or founded on conduct of, the Tennessee Valley Authority, or to amend or modify the

provisions of the Tennessee Valley Authority Act of 1933 with respect to actions by or against the Authority.

7 U.S.C. § 608c

§ 608c. Orders

(1) Issuance by Secretary

The Secretary of Agriculture shall, subject to the provisions of this section, issue, and from time to time amend, orders applicable to processors, associations of producers, and others engaged in the handling of any agricultural commodity or product thereof specified in subsection (2) of this section. Such persons are referred to in this chapter as "handlers". Such orders shall regulate, in the manner hereinafter in this section provided, only such handling of such agricultural commodity, or product thereof, as is in the current of interstate or foreign commerce, or which directly burdens, obstructs, or affects, interstate or foreign commerce in such commodity or product thereof. In carrying out this section, the Secretary shall complete all informal rulemaking actions necessary to respond to recommendations submitted by administrative committees for such orders as expeditiously as possible, but not more than 45 days (to the extent practicable) after submission of the committee recommendations. The Secretary is authorized to implement a producer allotment program and a handler withholding program under the cranberry marketing order in the same crop year through

informal rulemaking based on a recommendation and supporting economic analysis submitted by the Cranberry Marketing Committee. Such recommendation and analysis shall be submitted by the Committee no later than March 1 of each year. The Secretary shall establish time frames for each office and agency within the Department of Agriculture to consider the committee recommendations.

(2) Commodities to which applicable

Orders issued pursuant to this section shall be applicable only to (A) the following agricultural commodities and the products thereof (except canned or frozen pears, grapefruit, cherries, apples, or cranberries, the products of naval stores, and the products of honeybees), or to any regional, or market classification of any such commodity or product: Milk, fruits (including filberts, almonds, pecans and walnuts but not including apples, other than apples produced in the States of Washington, Oregon, Idaho, New York, Michigan, Maryland, New Jersey, Indiana, California, Maine, Vermont, New Hampshire, Rhode Island, Massachusetts, Connecticut, Colorado, Utah, New Mexico, Illinois, and Ohio, and not including fruits for canning or freezing other than pears, olives, grapefruit, cherries, caneberries (including raspberries, blackberries, and loganberries), cranberries, and apples produced in the States named above except Washington, Oregon, and Idaho), tobacco, vegetables (not including vegetables, other than asparagus, for canning or freezing and not including potatoes for canning, freezing, or other processing), hops, honeybees and

naval stores as included in the Naval Stores Act [7 U.S.C.A. § 91 et seq.] and standards established thereunder (including refined or partially refined oleoresin): *Provided*, That no order issued pursuant to this section shall be effective as to any grapefruit for canning or freezing unless the Secretary of Agriculture determines, in addition to other findings and determinations required by this chapter, that the issuance of such order is approved or favored by the processors who, during a representative period determined by the Secretary, have been engaged in canning or freezing such commodity for market and have canned or frozen for market more than 50 per centum of the total volume of such commodity canned or frozen for market during such representative period; and (B) any agricultural commodity (except honey, cotton, rice, wheat, corn, grain sorghums, oats, barley, rye, sugarcane, sugarbeets, wool, mohair, livestock, soybeans, cottonseed, flaxseed, poultry (but not excepting turkeys and not excepting poultry which produce commercial eggs), fruits and vegetables for canning or freezing, including potatoes for canning, freezing, or other processing and apples), or any regional or market classification thereof, not subject to orders under (A) of this subdivision, but not the products (including canned or frozen commodities or products) thereof. No order issued pursuant to this section shall be effective as to cherries, apples, or cranberries for canning or freezing unless the Secretary of Agriculture determines, in addition to other required findings and determinations, that the issuance of such order is approved or favored by processors who, during a representative period determined by the Secretary, have engaged in

canning or freezing such commodity for market and have frozen or canned more than 50 per centum of the total volume of the commodity to be regulated which was canned or frozen within the production area, or marketed within the marketing area, defined in such order, during such representative period. No order issued pursuant to this section shall be applicable to peanuts produced in more than one of the following production areas: the Virginia-Carolina production area, the Southeast production area, and the Southwest production area. If the Secretary determines that the declared policy of this chapter will be better achieved thereby (i) the commodities of the same general class and used wholly or in part for the same purposes may be combined and treated as a single commodity and (ii) the portion of an agricultural commodity devoted to or marketed for a particular use or combination of uses, may be treated as a separate agricultural commodity. All agricultural commodities and products covered hereby shall be deemed specified herein for the purposes of subsections (6) and (7) of this section.

(3) Notice and hearing

Whenever the Secretary of Agriculture has reason to believe that the issuance of an order will tend to effectuate the declared policy of this chapter with respect to any commodity or product thereof specified in subsection (2) of this section, he shall give due notice of and an opportunity for a hearing upon a proposed order.

(4) Finding and issuance of order

After such notice and opportunity for hearing, the Secretary of Agriculture shall issue an order if he finds, and sets forth in such order, upon the evidence introduced at such hearing (in addition to such other findings as may be specifically required by this section) that the issuance of such order and all of the terms and conditions thereof will tend to effectuate the declared policy of this chapter with respect to such commodity.

(5) Terms--Milk and its products

In the case of milk and its products, orders issued pursuant to this section shall contain one or more of the following terms and conditions, and (except as provided in subsection (7) of this section) no others:

(A) Classifying milk in accordance with the form in which or the purpose for which it is used, and fixing, or providing a method for fixing, minimum prices for each such use classification which all handlers shall pay, and the time when payments shall be made, for milk purchased from producers or associations of producers. Such prices shall be uniform as to all handlers, subject only to adjustments for (1) volume, market, and production differentials customarily applied by the handlers subject to such order, (2) the grade or quality of the milk purchased, and (3) the locations at which delivery of such milk, or any use classification thereof, is made to such handlers. Throughout the 2-year period beginning on the effective date of this sentence (and subsequent to such 2-year period unless modified by amendment to the order involved), the minimum aggregate amount

of the adjustments, under clauses (1) and (2) of the preceding sentence, to prices for milk of the highest use classification under orders that are in effect under this section on December 23, 1985, shall be as follows:

Marketing Area Subject to Order	Minimum Aggregate Dollar Amount of Such Adjustments Per Hundredweight of Milk Having 3.5 Percent Milkfat
New England	$3.24
New York-New Jersey	3.14
Middle Atlantic	3.03
Georgia	3.08
Alabama-West Florida	3.08
Upper Florida	3.58
Tampa Bay	3.88
Southeastern Florida	4.18
Michigan Upper Peninsula	1.35
Southern Michigan	1.75
Eastern Ohio-Western Pennsylvania	1.95
Ohio Valley	2.04
Indiana	2.00
Chicago Regional	1.40
Central Illinois	1.61
Southern Illinois	1.92
Louisville-Lexington-Evansville	2.11
Upper Midwest	1.20
Eastern South Dakota	1.50
Black Hills, South Dakota	2.05
Iowa	1.55
Nebraska-Western Iowa	1.75
Greater Kansas City	1.92
Tennessee Valley	2.77
Nashville, Tennessee	2.52
Paducah, Kentucky	2.39
Memphis, Tennessee	2.77
Central Arkansas	2.77
Fort Smith, Arkansas	2.77
Southwest Plains	2.77
Texas Panhandle	2.49
Lubbock-Plainview, Texas	2.49

Texas	3.28
Greater Louisiana	3.28
New Orleans-Mississippi	3.85
Eastern Colorado	2.73
Western Colorado	2.00
Southwestern Idaho-Eastern Oregon	1.50
Great Basin	1.90
Lake Mead	1.60
Central Arizona	2.52
Rio Grande Valley	2.35
Puget Sound-Inland	1.85
Oregon-Washington	1.95

Effective at the beginning of such two-year period, the minimum prices for milk of the highest use classification shall be adjusted for the locations at which delivery of such milk is made to such handlers.

(B) Providing:

(i) for the payment to all producers and associations of producers delivering milk to the same handler of uniform prices for all milk delivered by them: *Provided*, That, except in the case of orders covering milk products only, such provision is approved or favored by at least three-fourths of the producers who, during a representative period determined by the Secretary of Agriculture, have been engaged in the production for market of milk covered in such order or by producers who, during such representative period, have produced at least three-fourths of the volume of such milk produced for market during such period; the approval required hereunder shall be separate and apart from any other approval or disapproval provided for by this section; or

(ii) for the payment to all producers and associations of producers delivering milk to all handlers of uniform prices for all milk so delivered, irrespective of the uses made of such milk by the individual handler to whom it is delivered;

subject, in either case, only to adjustments for (a) volume, market, and production differentials customarily applied by the handlers subject to such order, (b) the grade or quality of the milk delivered, (c) the locations at which delivery of such milk is made, and (d) a further adjustment, equitably to apportion the total value of the milk purchased by any handler, or by all handlers, among producers and associations of producers, on the basis of their marketings of milk during a representative period of time., [(e) omitted] and (f) a further adjustment, equitably to apportion the total value of milk purchased by any handler or by all handlers among producers on the basis of the milk components contained in their marketings of milk

(C) In order to accomplish the purposes set forth in paragraphs (A) and (B) of this subsection, providing a method for making adjustments in payments, as among handlers (including producers who are also handlers), to the end that the total sums paid by each handler shall equal the value of the milk purchased by him at the prices fixed in accordance with paragraph (A) of this subsection.

(D) Providing that, in the case of all milk purchased by handlers from any producer who did not regularly sell milk during a period of 30 days next preceding

the effective date of such order for consumption in the area covered thereby, payments to such producer, for the period beginning with the first regular delivery by such producer and continuing until the end of two full calendar months following the first day of the next succeeding calendar month, shall be made at the price for the lowest use classification specified in such order, subject to the adjustments specified in paragraph (B) of this subsection.

(E) Providing (i) except as to producers for whom such services are being rendered by a cooperative marketing association, qualified as provided in paragraph (F) of this subsection, for market information to producers and for the verification of weights, sampling, and testing of milk purchased from producers, and for making appropriate deductions therefor from payments to producers, and (ii) for assurance of, and security for, the payment by handlers for milk purchased.

(F) Nothing contained in this subsection is intended or shall be construed to prevent a cooperative marketing association qualified under the provisions of sections 291 and 292 of this title, engaged in making collective sales or marketing of milk or its products for the producers thereof, from blending the net proceeds of all of its sales in all markets in all use classifications, and making distribution thereof to its producers in accordance with the contract between the association and its producers: *Provided*, That it shall not sell milk or its products to any handler for use or consumption in any market at

prices less than the prices fixed pursuant to paragraph (A) of this subsection for such milk.

(G) No marketing agreement or order applicable to milk and its products in any marketing area shall prohibit or in any manner limit, in the case of the products of milk, the marketing in that area of any milk or product thereof produced in any production area in the United States.

(H) Omitted

(I) Establishing or providing for the establishment of research and development projects, and advertising (excluding brand advertising), sales promotion, educational, and other programs designed to improve or promote the domestic marketing and consumption of milk and its products, to be financed by producers in a manner and at a rate specified in the order, on all producer milk under the order. Producer contributions under this subparagraph may be deducted from funds due producers in computing total pool value or otherwise computing total funds due producers and such deductions shall be in addition to the adjustments authorized by paragraph (B) of this subsection. Provision may be made in the order to exempt, or allow suitable adjustments or credits in connection with, milk on which a mandatory checkoff for advertising or marketing research is required under the authority of any State law. Such funds shall be paid to an agency organized by milk producers and producers' cooperative associations in such form and with such methods of operation as shall be specified in the order. Such agency may expend such funds for any of the

purposes authorized by this subparagraph and may designate, employ, and allocate funds to persons and organizations engaged in such programs which meet the standards and qualifications specified in the order. All funds collected under this subparagraph shall be separately accounted for and shall be used only for the purposes for which they were collected. Programs authorized by this subparagraph may be either local or national in scope, or both, as provided in the order, but shall not be international. Order provisions under this subparagraph shall not become effective in any marketing order unless such provisions are approved by producers separately from other order provisions, in the same manner provided for the approval of marketing orders, and may be terminated separately whenever the Secretary makes a determination with respect to such provisions as is provided for the termination of an order in subsection (16)(B) of this section. Disapproval or termination of such order provisions shall not be considered disapproval of the order or of other terms of the order. Notwithstanding any other provision of this chapter, any producer against whose marketings any assessment is withheld or collected under the authority of this subparagraph, and who is not in favor of supporting the research and promotion programs, as provided for herein, shall have the right to demand and receive a refund of such assessment pursuant to the terms and conditions specified in the order.

(J) Providing for the payment, from the total sums payable by all handlers for milk (irrespective of the use classification of such milk) and before computing uniform prices under paragraph (A) and making

adjustments in payments under paragraph (C), to handlers that are cooperative marketing associations described in paragraph (F) and to handlers with respect to which adjustments in payments are made under paragraph (C), for services of marketwide benefit, including but not limited to--

(i) providing facilities to furnish additional supplies of milk needed by handlers and to handle and dispose of milk supplies in excess of quantities needed by handlers;

(ii) handling on specific days quantities of milk that exceed the quantities needed by handlers; and

(iii) transporting milk from one location to another for the purpose of fulfilling requirements for milk of a higher use classification or for providing a market outlet for milk of any use classification.

(K)(i) Notwithstanding any other provision of law, milk produced by dairies--

(I) owned or controlled by foreign persons; and

(II) financed by or with the use of bonds the interest on which is exempt from Federal income tax under section 103 of Title 26;

shall be treated as other-source milk, and shall be allocated as milk received from producer-handlers for the purposes of classifying producer milk, under the milk marketing program established under this chapter. For the purposes of this subparagraph, the

term "foreign person" has the meaning given such term under section 3508(3) of this title.

(ii) The Secretary of Agriculture shall prescribe regulations to carry out this subparagraph.

(iii) This subparagraph shall not apply with respect to any dairy that began operation before May 6, 1986.

(L) Providing that adjustments in payments by handlers under paragraph (A) need not be the same as adjustments to producers under paragraph (B) with regard to adjustments authorized by subparagraphs (2) and (3) of paragraph (A) and clauses (b), (c), and (d) of paragraph (B)(ii).

(M) Minimum Milk Prices for Handlers

(i) Application of minimum price requirements

Notwithstanding any other provision of this section, a milk handler described in clause (ii) shall be subject to all of the minimum and uniform price requirements of a Federal milk marketing order issued pursuant to this section applicable to the county in which the plant of the handler is located, at Federal order class prices, if the handler has packaged fluid milk product route dispositions, or sales of packaged fluid milk products to other plants, in a marketing area located in a State that requires handlers to pay minimum prices for raw milk purchases.

(ii) Covered milk handlers

Except as provided in clause (iv), clause (i) applies to a handler of Class I milk products (including a producer-handler or producer operating as a handler) that--

(I) operates a plant that is located within the boundaries of a Federal order milk marketing area (as those boundaries are in effect as of April 11, 2006);

(II) has packaged fluid milk product route dispositions, or sales of packaged fluid milk products to other plants, in a milk marketing area located in a State that requires handlers to pay minimum prices for raw milk purchases; and

(III) is not otherwise obligated by a Federal milk marketing order, or a regulated milk pricing plan operated by a State, to pay minimum class prices for the raw milk that is used for such dispositions or sales.

(iii) Obligation to pay minimum class prices

For purposes of clause (ii)(III), the Secretary may not consider a handler of Class I milk products to be obligated by a Federal milk marketing order to pay minimum class prices for raw milk unless the handler operates the plant as a fully regulated fluid milk distributing plant under a Federal milk marketing order.

(iv) Certain handlers exempted

Clause (i) does not apply to--

(I) a handler (otherwise described in clause (ii)) that operates a nonpool plant (as defined in section 1000.8(e) of title 7, Code of Federal Regulations, as in effect on April 11, 2006);

(II) a producer-handler (otherwise described in clause (ii)) for any month during which the producer-handler has route dispositions, and sales to other plants, of packaged fluid milk products equaling less than 3,000,000 pounds of milk; or

(III) a handler (otherwise described in clause (ii)) for any month during which--

(aa) less than 25 percent of the total quantity of fluid milk products physically received at the plant of the handler (excluding concentrated milk received from another plant by agreement for other than Class I use) is disposed of as route disposition or is transferred in the form of packaged fluid milk products to other plants; or

(bb) less than 25 percent in aggregate of the route disposition or transfers are in a marketing area or areas located in one or more States that require handlers to pay minimum prices for raw milk purchases.

(N) Exemption for Certain Milk Handlers

Notwithstanding any other provision of this section, no handler with distribution of Class I milk products in the marketing area described in Order No. 131

shall be exempt during any month from any minimum price requirement established by the Secretary under this subsection if the total distribution of Class I products during the preceding month of any such handler's own farm production exceeds 3,000,000 pounds.

(O) Rule of Construction Regarding Producer-Handlers

Subparagraphs (M) and (N) shall not be construed as affecting, expanding, or contracting the treatment of producer-handlers under this subsection except as provided in such subparagraphs.

(6) Terms--Other commodities

In the case of the agricultural commodities and the products thereof, other than milk and its products, specified in subsection (2) of this section orders issued pursuant to this section shall contain one or more of the following terms and conditions, and (except as provided in subsection (7) of this section), no others:

(A) Limiting, or providing methods for the limitation of, the total quantity of any such commodity or product, or of any grade, size, or quality thereof, produced during any specified period or periods, which may be marketed in or transported to any or all markets in the current of interstate or foreign commerce or so as directly to burden, obstruct, or affect interstate or foreign commerce in such commodity or product thereof, during any specified period or periods by all handlers thereof.

(B) Allotting, or providing methods for allotting, the amount of such commodity or product, or any grade, size, or quality thereof, which each handler may purchase from or handle on behalf of any and all producers thereof, during any specified period or periods, under a uniform rule based upon the amounts sold by such producers in such prior period as the Secretary determines to be representative, or upon the current quantities available for sale by such producers, or both, to the end that the total quantity thereof to be purchased, or handled during any specified period or periods shall be apportioned equitably among producers.

(C) Allotting, or providing methods for allotting, the amount of any such commodity or product, or any grade, size, or quality thereof, which each handler may market in or transport to any or all markets in the current of interstate or foreign commerce or so as directly to burden, obstruct, or affect interstate or foreign commerce in such commodity or product thereof, under a uniform rule based upon the amounts which each such handler has available for current shipment, or upon the amounts shipped by each such handler in such prior period as the Secretary determines to be representative, or both, to the end that the total quantity of such commodity or product, or any grade, size, or quality thereof, to be marketed in or transported to any or all markets in the current of interstate or foreign commerce or so as directly to burden, obstruct, or affect interstate or foreign commerce in such commodity or product thereof, during any specified period or periods shall

be equitably apportioned among all of the handlers thereof.

(D) Determining, or providing methods for determining, the existence and extent of the surplus of any such commodity or product, or of any grade, size, or quality thereof, and providing for the control and disposition of such surplus, and for equalizing the burden of such surplus elimination or control among the producers and handlers thereof.

(E) Establishing or providing for the establishment of reserve pools of any such commodity or product, or of any grade, size, or quality thereof, and providing for the equitable distribution of the net return derived from the sale thereof among the persons beneficially interested therein.

(F) Requiring or providing for the requirement of inspection of any such commodity or product produced during specified periods and marketed by handlers.

(G) In the case of hops and their products in addition to, or in lieu of, the foregoing terms and conditions, orders may contain one or more of the following:

(i) Limiting, or providing methods for the limitation of, the total quantity thereof, or of any grade, type, or variety thereof, produced during any specified period or periods, which all handlers may handle in the current of or so as directly to burden, obstruct, or affect interstate or foreign commerce in hops or any product thereof.

(ii) Apportioning, or providing methods for apportioning, the total quantity of hops of the production of the then current calendar year permitted to be handled equitably among all producers in the production area to which the order applies upon the basis of one or more or a combination of the following: The total quantity of hops available or estimated will become available for market by each producer from his production during such period; the normal production of the acreage of hops operated by each producer during such period upon the basis of the number of acres of hops in production, and the average yield of that acreage during such period as the Secretary determines to be representative, with adjustments determined by the Secretary to be proper for age of plantings or abnormal conditions affecting yield; such normal production or historical record of any acreage for which data as to yield of hops are not available or which had no yield during such period shall be determined by the Secretary on the basis of the yields of other acreage of hops of similar characteristics as to productivity, subject to adjustment as just provided for.

(iii) Allotting, or providing methods for allotting, the quantity of hops which any handler may handle so that the allotment fixed for that handler shall be limited to the quantity of hops apportioned under preceding section (ii) to each respective producer of hops; such allotment shall constitute an allotment fixed for that handler within the meaning of subsection (5) of section 608a of this title.

(H) providing a method for fixing the size, capacity, weight, dimensions, or pack of the container, or containers, which may be used in the packaging, transportation, sale, shipment, or handling of any fresh or dried fruits, vegetables, or tree nuts: *Provided, however*, That no action taken hereunder shall conflict with the Standard Containers Act of 1916 (15 U.S.C. 251-256) and the Standard Containers Act of 1928 (15 U.S.C. 257-257i);

(I) establishing or providing for the establishment of production research, marketing research and development projects designed to assist, improve, or promote the marketing, distribution, and consumption or efficient production of any such commodity or product, the expense of such projects to be paid from funds collected pursuant to the marketing order: *Provided*, That with respect to orders applicable to almonds, filberts (otherwise known as hazelnuts), California-grown peaches, cherries, papayas, carrots, citrus fruits, onions, Tokay grapes, pears, dates, plums, nectarines, celery, sweet corn, limes, olives, pecans, eggs, avocados, apples, raisins, walnuts, tomatoes, caneberries (including raspberries, blackberries, and loganberries), Florida grown strawberries, or cranberries, such projects may provide for any form of marketing promotion including paid advertising and with respect to almonds, filberts (otherwise known as hazelnuts), raisins, walnuts, olives, Florida Indian River grapefruit, and cranberries may provide for crediting the pro rata expense assessment obligations of a handler with all or any portion of his direct expenditures for such marketing promotion including paid advertising as may be authorized by

the order and when the handling of any commodity for canning or freezing is regulated, then any such projects may also deal with the commodity or its products in canned or frozen form: *Provided further*, That the inclusion in a Federal marketing order of provisions for research and marketing promotion, including paid advertising, shall not be deemed to preclude, preempt or supersede any such provisions in any State program covering the same commodity.

(J) In the case of pears for canning or freezing, any order for a production area encompassing territory within two or more States or portions thereof shall provide that the grade, size, quality, maturity, and inspection regulation under the order applicable to pears grown within any such State or portion thereof may be recommended to the Secretary by the agency established to administer the order only if a majority of the representatives from that State on such agency concur in the recommendation each year.

(7) Terms common to all orders

In the case of the agricultural commodities and the products thereof specified in subsection (2) of this section orders shall contain one or more of the following terms and conditions:

(A) Prohibiting unfair methods of competition and unfair trade practices in the handling thereof.

(B) Providing that (except for milk and cream to be sold for consumption in fluid form) such commodity or product thereof, or any grade, size, or quality thereof shall be sold by the handlers thereof only at

prices filed by such handlers in the manner provided in such order.

(C) Providing for the selection by the Secretary of Agriculture, or a method for the selection, of an agency or agencies and defining their powers and duties, which shall include only the powers:

(i) To administer such order in accordance with its terms and provisions;

(ii) To make rules and regulations to effectuate the terms and provisions of such order;

(iii) To receive, investigate, and report to the Secretary of Agriculture complaints of violations of such order; and

(iv) To recommend to the Secretary of Agriculture amendments to such order.

No person acting as a member of an agency established pursuant to this paragraph shall be deemed to be acting in an official capacity, within the meaning of section 610(g) of this title, unless such person receives compensation for his personal services from funds of the United States. There shall be included in the membership of any agency selected to administer a marketing order applicable to grapefruit for canning or freezing one or more representatives of processors of the commodity specified in such order.

(D) Incidental to, and not inconsistent with, the terms and conditions specified in subsections (5), (6),

and (7) of this section and necessary to effectuate the other provisions of such order.

(8) Orders with marketing agreement

Except as provided in subsection (9) of this section, no order issued pursuant to this section shall become effective until the handlers (excluding cooperative associations of producers who are not engaged in processing, distributing, or shipping the commodity or product thereof covered by such order) of not less than 50 per centum of the volume of the commodity or product thereof covered by such order which is produced or marketed within the production or marketing area defined in such order have signed a marketing agreement, entered into pursuant to section 608b of this title, which regulates the handling of such commodity or product in the same manner as such order, except that as to citrus fruits produced in any area producing what is known as California citrus fruits no order issued pursuant to this subsection shall become effective until the handlers of not less than 80 per centum of the volume of such commodity or product thereof covered by such order have signed such a marketing agreement: *Provided*, That no order issued pursuant to this subsection shall be effective unless the Secretary of Agriculture determines that the issuance of such order is approved or favored:

(A) By at least two-thirds of the producers who (except that as to citrus fruits produced in any area producing what is known as California citrus fruits said order must be approved or favored by three-fourths of the producers), during a representative

period determined by the Secretary, have been engaged, within the production area specified in such marketing agreement or order, in the production for market of the commodity specified therein, or who, during such representative period, have been engaged in the production of such commodity for sale in the marketing area specified in such marketing agreement, or order, or

(B) By producers who, during such representative period, have produced for market at least two-thirds of the volume of such commodity produced for market within the production area specified in such marketing agreement or order, or who, during such representative period, have produced at least two-thirds of the volume of such commodity sold within the marketing area specified in such marketing agreement or order.

(9) Orders with or without marketing agreement

Any order issued pursuant to this section shall become effective in the event that, notwithstanding the refusal or failure of handlers (excluding cooperative associations of producers who are not engaged in processing, distributing, or shipping the commodity or product thereof covered by such order) of more than 50 per centum of the volume of the commodity or product thereof (except that as to citrus fruits produced in any area producing what is known as California citrus fruits said per centum shall be 80 per centum) covered by such order which is produced or marketed within the production or marketing area defined in such order to sign a marketing agreement relating to such commodity or

product thereof, on which a hearing has been held, the Secretary of Agriculture determines:

(A) That the refusal or failure to sign a marketing agreement (upon which a hearing has been held) by the handlers (excluding cooperative associations of producers who are not engaged in processing, distributing, or shipping the commodity or product thereof covered by such order) of more than 50 per centum of the volume of the commodity or product thereof (except that as to citrus fruits produced in any area producing what is known as California citrus fruits said per centum shall be 80 per centum) specified therein which is produced or marketed within the production or marketing area specified therein tends to prevent the effectuation of the declared policy of this chapter with respect to such commodity or product, and

(B) That the issuance of such order is the only practical means of advancing the interests of the producers of such commodity pursuant to the declared policy, and is approved or favored:

(i) By at least two-thirds of the producers (except that as to citrus fruits produced in any area producing what is known as California citrus fruits said order must be approved or favored by three-fourths of the producers) who, during a representative period determined by the Secretary, have been engaged, within the production area specified in such marketing agreement or order, in the production for market of the commodity specified therein, or who, during such representative period, have been engaged in the production of such

commodity for sale in the marketing area specified in such marketing agreement, or order, or

(ii) By producers who, during such representative period, have produced for market at least two-thirds of the volume of such commodity produced for market within the production area specified in such marketing agreement or order, or who, during such representative period, have produced at least two-thirds of the volume of such commodity sold within the marketing area specified in such marketing agreement or order.

(10) Manner of regulation and applicability

No order shall be issued under this section unless it regulates the handling of the commodity or product covered thereby in the same manner as, and is made applicable only to persons in the respective classes of industrial or commercial activity specified in, a marketing agreement upon which a hearing has been held. No order shall be issued under this chapter prohibiting, regulating, or restricting the advertising of any commodity or product covered thereby, nor shall any marketing agreement contain any provision prohibiting, regulating, or restricting the advertising of any commodity, or product covered by such marketing agreement.

(11) Regional application

(A) No order shall be issued under this section which is applicable to all production areas or marketing areas, or both, of any commodity or product thereof unless the Secretary finds that the issuance of

several orders applicable to the respective regional production areas or regional marketing areas, or both, as the case may be, of the commodity or product would not effectively carry out the declared policy of this chapter.

(B) Except in the case of milk and its products, orders issued under this section shall be limited in their application to the smallest regional production areas or regional marketing areas, or both, as the case may be, which the Secretary finds practicable, consistently with carrying out such declared policy.

(C) All orders issued under this section which are applicable to the same commodity or product thereof shall, so far as practicable, prescribe such different terms, applicable to different production areas and marketing areas, as the Secretary finds necessary to give due recognition to the differences in production and marketing of such commodity or product in such areas.

(D) In the case of milk and its products, no county or other political subdivision of the State of Nevada shall be within the marketing area definition of any order issued under this section.

(12) Cooperative association representation

Whenever, pursuant to the provisions of this section, the Secretary is required to determine the approval or disapproval of producers with respect to the issuance of any order, or any term or condition thereof, or the termination thereof, the Secretary shall consider the approval or disapproval by any

cooperative association of producers, bona fide engaged in marketing the commodity or product thereof covered by such order, or in rendering services for or advancing the interests of the producers of such commodity, as the approval or disapproval of the producers who are members of, stockholders in, or under contract with, such cooperative association of producers.

(13) Retailer and producer exemption

(A) No order issued under subsection (9) of this section shall be applicable to any person who sells agricultural commodities or products thereof at retail in his capacity as such retailer, except to a retailer in his capacity as a retailer of milk and its products.

(B) No order issued under this chapter shall be applicable to any producer in his capacity as a producer.

(14) Violation of order

(A) Any handler subject to an order issued under this section, or any officer, director, agent, or employee of such handler, who violates any provision of such order shall, on conviction, be fined not less than $50 or more than $5,000 for each such violation, and each day during which such violation continues shall be deemed a separate violation. If the court finds that a petition pursuant to subsection (15) of this section was filed and prosecuted by the defendant in good faith and not for delay, no penalty shall be imposed under this subsection for such violations as occurred between the date upon which

the defendant's petition was filed with the Secretary, and the date upon which notice of the Secretary's ruling thereon was given to the defendant in accordance with regulations prescribed pursuant to subsection (15) of this section.

(B) Any handler subject to an order issued under this section, or any officer, director, agent, or employee of such handler, who violates any provision of such order may be assessed a civil penalty by the Secretary not exceeding $1,000 for each such violation. Each day during which such violation continues shall be deemed a separate violation, except that if the Secretary finds that a petition pursuant to paragraph (15) was filed and prosecuted by the handler in good faith and not for delay, no civil penalty may be assessed under this paragraph for such violations as occurred between the date on which the handler's petition was filed with the Secretary, and the date on which notice of the Secretary's ruling thereon was given to the handler in accordance with regulations prescribed pursuant to paragraph (15). The Secretary may issue an order assessing a civil penalty under this paragraph only after notice and an opportunity for an agency hearing on the record. Such order shall be treated as a final order reviewable in the district courts of the United States in any district in which the handler subject to the order is an inhabitant, or has the handler's principal place of business. The validity of such order may not be reviewed in an action to collect such civil penalty.

(15) Petition by handler and review

(A) Any handler subject to an order may file a written petition with the Secretary of Agriculture, stating that any such order or any provision of any such order or any obligation imposed in connection therewith is not in accordance with law and praying for a modification thereof or to be exempted therefrom. He shall thereupon be given an opportunity for a hearing upon such petition, in accordance with regulations made by the Secretary of Agriculture, with the approval of the President. After such hearing, the Secretary shall make a ruling upon the prayer of such petition which shall be final, if in accordance with law.

(B) The District Courts of the United States in any district in which such handler is an inhabitant, or has his principal place of business, are hereby vested with jurisdiction in equity to review such ruling, provided a bill in equity for that purpose is filed within twenty days from the date of the entry of such ruling. Service of process in such proceedings may be had upon the Secretary by delivering to him a copy of the bill of complaint. If the court determines that such ruling is not in accordance with law, it shall remand such proceedings to the Secretary with directions either (1) to make such ruling as the court shall determine to be in accordance with law, or (2) to take such further proceedings as, in its opinion, the law requires. The pendency of proceedings instituted pursuant to this subsection (15) shall not impede, hinder, or delay the United States or the Secretary of Agriculture from obtaining relief pursuant to section 608a(6) of this title. Any proceedings brought pursuant to section 608a(6) of this title (except where brought by way of

counterclaim in proceedings instituted pursuant to this subsection (15)) shall abate whenever a final decree has been rendered in proceedings between the same parties, and covering the same subject matter, instituted pursuant to this subsection (15).

(16) Termination of orders and marketing agreements

(A)(i) Except as provided in clause (ii), the Secretary of Agriculture shall, whenever he finds that any order issued under this section, or any provision thereof, obstructs or does not tend to effectuate the declared policy of this chapter, terminate or suspend the operation of such order or such provision thereof.

(ii) The Secretary may not terminate any order issued under this section for a commodity for which there is no Federal program established to support the price of such commodity unless the Secretary gives notice of, and a statement of the reasons relied upon by the Secretary for, the proposed termination of such order to the Committee on Agriculture, Nutrition, and Forestry of the Senate and the Committee on Agriculture of the House of Representatives not later than 60 days before the date such order will be terminated.

(B) The Secretary shall terminate any marketing agreement entered into under section 608b of this title, or order issued under this section, at the end of the then current marketing period for such commodity, specified in such marketing agreement or order, whenever he finds that such termination is favored by a majority of the producers who, during a

representative period determined by the Secretary, have been engaged in the production for market of the commodity specified in such marketing agreement or order, within the production area specified in such marketing agreement or order, or who, during such representative period, have been engaged in the production of such commodity for sale within the marketing area specified in such marketing agreement or order: *Provided*, That such majority have, during such representative period, produced for market more than 50 per centum of the volume of such commodity produced for market within the production area specified in such marketing agreement or order, or have, during such representative period, produced more than 50 per centum of the volume of such commodity sold in the marketing area specified in such marketing agreement or order, but such termination shall be effective only if announced on or before such date (prior to the end of the then current marketing period) as may be specified in such marketing agreement or order.

(C) Except as otherwise provided in this subsection with respect to the termination of an order issued under this section, the termination or suspension of any order or amendment thereto or provision thereof, shall not be considered an order within the meaning of this section.

(17) Provisions applicable to amendments

(A) Applicability to amendments

The provisions of this section and section 608d of this title applicable to orders shall be applicable to amendments to orders.

(B) Supplemental rules of practice

(i) In general

Not later than 60 days after the date of enactment of this subparagraph, the Secretary shall issue, using informal rulemaking, supplemental rules of practice to define guidelines and timeframes for the rulemaking process relating to amendments to orders.

(ii) Issues

At a minimum, the supplemental rules of practice shall establish--

(I) proposal submission requirements;

(II) pre-hearing information session specifications;

(III) written testimony and data request requirements;

(IV) public participation timeframes; and

(V) electronic document submission standards.

(iii) Effective date

The supplemental rules of practice shall take effect not later than 120 days after the date of enactment

of this subparagraph, as determined by the Secretary.

(C) Hearing timeframes

(i) In general

Not more than 30 days after the receipt of a proposal for an amendment hearing regarding a milk marketing order, the Secretary shall--

(I) issue a notice providing an action plan and expected timeframes for completion of the hearing not more than 120 days after the date of the issuance of the notice;

(II)(aa) issue a request for additional information to be used by the Secretary in making a determination regarding the proposal; and

(bb) if the additional information is not provided to the Secretary within the timeframe requested by the Secretary, issue a denial of the request; or

(III) issue a denial of the request.

(ii) Requirement

A post-hearing brief may be filed under this paragraph not later than 60 days after the date of an amendment hearing regarding a milk marketing order.

(iii) Recommended decisions

A recommended decision on a proposed amendment to an order shall be issued not later than 90 days after the deadline for the submission of post-hearing briefs.

(iv) Final decisions

A final decision on a proposed amendment to an order shall be issued not later than 60 days after the deadline for submission of comments and exceptions to the recommended decision issued under clause (iii).

(D) Industry assessments

If the Secretary determines it is necessary to improve or expedite rulemaking under this subsection, the Secretary may impose an assessment on the affected industry to supplement appropriated funds for the procurement of service providers, such as court reporters.

(E) Use of informal rulemaking

The Secretary may use rulemaking under section 553 of Title 5 to amend orders, other than provisions of orders that directly affect milk prices.

(F) Avoiding duplication

The Secretary shall not be required to hold a hearing on any amendment proposed to be made to a milk marketing order in response to an application for a hearing on the proposed amendment if--

(i) the application requesting the hearing is received by the Secretary not later than 90 days after the date on which the Secretary has announced the decision on a previously proposed amendment to that order; and

(ii) the 2 proposed amendments are essentially the same, as determined by the Secretary.

(G) Monthly feed and fuel costs for make allowances

As part of any hearing to adjust make allowances under marketing orders commencing prior to September 30, 2012, the Secretary shall--

(i) determine the average monthly prices of feed and fuel incurred by dairy producers in the relevant marketing area;

(ii) consider the most recent monthly feed and fuel price data available; and

(iii) consider those prices in determining whether or not to adjust make allowances.

(18) Milk prices

The Secretary of Agriculture, prior to prescribing any term in any marketing agreement or order, or amendment thereto, relating to milk or its products, if such term is to fix minimum prices to be paid to producers or associations of producers, or prior to modifying the price fixed in any such term, shall ascertain the parity prices of such commodities. The prices which it is declared to be the policy of

Congress to establish in section 602 of this title shall, for the purposes of such agreement, order, or amendment, be adjusted to reflect the price of feeds, the available supplies of feeds, and other economic conditions which affect market supply and demand for milk or its products in the marketing area to which the contemplated marketing agreement, order, or amendment relates. Whenever the Secretary finds, upon the basis of the evidence adduced at the hearing required by section 608b of this title or this section, as the case may be, that the parity prices of such commodities are not reasonable in view of the price of feeds, the available supplies of feeds, and other economic conditions which affect market supply and demand for milk and its products in the marketing area to which the contemplated agreement, order, or amendment relates, he shall fix such prices as he finds will reflect such factors, insure a sufficient quantity of pure and wholesome milk, and be in the public interest. Thereafter, as the Secretary finds necessary on account of changed circumstances, he shall, after due notice and opportunity for hearing, make adjustments in such prices.

(19) Producer referendum

For the purpose of ascertaining whether the issuance of an order is approved or favored by producers or processors, as required under the applicable provisions of this chapter, the Secretary may conduct a referendum among producers or processors and in the case of an order other than an amendatory order shall do so. The requirements of approval or favor under any such provision shall be held to be complied

with if, of the total number of producers or processors, or the total volume of production, as the case may be, represented in such referendum, the percentage approving or favoring is equal to or in excess of the percentage required under such provision. The terms and conditions of the proposed order shall be described by the Secretary in the ballot used in the conduct of the referendum. The nature, content, or extent of such description shall not be a basis for attacking the legality of the order or any action relating thereto. Nothing in this subsection shall be construed as limiting representation by cooperative associations as provided in subsection (12) of this section. For the purpose of ascertaining whether the issuance of an order applicable to pears for canning or freezing is approved or favored by producers as required under the applicable provisions of this chapter, the Secretary shall conduct a referendum among producers in each State in which pears for canning or freezing are proposed to be included within the provisions of such marketing order and the requirements of approval or favor under any such provisions applicable to pears for canning or freezing shall be held to be complied with if, of the total number of producers, or the total volume of production, as the case may be, represented in such referendum, the percentage approving or favoring is equal to or in excess of 66 2/3 per centum except that in the event that pear producers in any State fail to approve or favor the issuance of any such marketing order, it shall not be made effective in such State.

7 C.F.R. § 989.11

§ 989.11 Producer.

Producer means any person engaged in a proprietary capacity in the production of grapes which are sun-dried or dehydrated by artificial means until they become raisins: *Provided*, That a "producer" shall include any person whose production unit has qualified for diversion under a diversion program announced by the Committee.

7 C.F.R. § 989.15

§ 989.15 Handler.

Handler means: (a) Any processor or packer; (b) any person who places, ships, or continues natural condition raisins in the current of commerce from within the area to any point outside thereof; (c) any person who delivers off-grade raisins, other failing raisins or raisin residual material to other than a packer or other than into any eligible non-normal outlet; or (d) any person who blends raisins: *Provided*, That blending shall not cause a person not otherwise a handler to be a handler on account of such blending if he is either: (1) A producer who, in his capacity as a producer, blends raisins entirely of his own production in the course of his usual and customary practices of preparing raisins for delivery to processors, packers, or dehydrators; (2) a person who blends raisins after they have been placed in trade channels by a packer with other such raisins in trade channels; or (3) a dehydrator who, in his capacity as a dehydrator, blends raisins entirely of his own manufacture.

OPPOSITION BRIEF

RECORD
AND
BRIEFS

OCT 2 6 2012

No. 12-123

In the Supreme Court of the United States

MARVIN D. HORNE, ET AL., PETITIONERS

v.

UNITED STATES DEPARTMENT OF AGRICULTURE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record
STUART F. DELERY
Acting Assistant Attorney General
MICHAEL S. RAAB
JOSHUA WALDMAN
Attorneys
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

Library of Congress
Law Library

QUESTION PRESENTED

Whether petitioners must first seek compensation in the Court of Federal Claims in connection with their Just Compensation Clause challenge to a marketing order issued under the Agricultural Marketing Agreement Act of 1937, 7 U.S.C. 601 *et seq.*

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statement 2
Argument 8
Conclusion 20

TABLE OF AUTHORITIES

Cases: Page

Asociacion de Subscripcion Conjunta del Seguro de Responsabilidad Obligatorio v. *Flores Galarza*, 484 F.3d 1 (1st Cir. 2007) 12
Bay View, Inc. v. *AHTNA, Inc.*, 105 F.3d 1281 (9th Cir. 1997) 7, 11, 12
Block v. *Community Nutrition Inst.*, 467 U.S. 340, (1984) 2
Chateaugay Corp, In re, 53 F.3d 478 (2d Cir.), cert. denied, 516 U.S. 913 (1995) 12
Cutter v. *Wilkinson*, 544 U.S. 709 (2005) 16
Eastern Enters. v. *Apfel*, 524 U.S. 498 (1998) 7, 9, 11, 13, 16
Kirby Forest Indus., Inc. v. *United States*, 467 U.S. 1 (1984) 13
Lion Raisins, Inc. v. *United States*, 416 F.3d 1356 (Fed. Cir. 2005) 3, 18, 19
Preseault v. *ICC*, 494 U.S. 1 (1990) 9
Regional Rail Reorg. Act Cases, 419 U.S. 102 (1974) 9
Ruckelshaus v. *Monsanto Co.*, 467 U.S. 986 (1984) 9, 15
Student Loan Mktg. Ass'n v. *Riley*, 104 F.3d 397 (D.C. Cir.), cert. denied, 522 U.S. 913 (1997) 12
United Parcel Serv., Inc. v. *Mitchell*, 451 U.S. 56 (1981) 9

Cases—Continued: Page

Washington Legal Found. v. *Texas Equal Access to Justice Found.*, 270 F.3d 180 (5th Cir. 2001), vacated on other grounds *sub nom. Phillips* v. *Washington Legal Found.*, 538 U.S. 942 (2003) 12

Washlefske v. *Winston*, 234 F.3d 179 (4th Cir. 2000), cert. denied, 532 U.S. 983 (2001) 12

Williamson Cnty. Reg'l Planning Comm'n v. *Hamilton Bank*, 473 U.S. 172 (1985) 7, 8, 9, 15

Constitution, statutes and regulations:

U.S. Const. Amend V (Just Compensation Clause) 8

Agricultural Marketing Agreement Act of 1937, 7 U.S.C. 601 *et seq.* 2

7 U.S.C. 602(1) 2

7 U.S.C. 602(2) 2

7 U.S.C. 608c 2

7 U.S.C. 608c(1) 3

7 U.S.C. 608c(5)(K) 17

7 U.S.C. 608c(5)(M) 17

7 U.S.C. 608c(5)(O) 17

7 U.S.C. 608c(6)(E) 2

7 U.S.C. 608c(8) 17

7 U.S.C. 608c(9) 17

7 U.S.C. 608c(13)(B) 3, 6, 17

7 U.S.C. 608c(14)(B) 5

7 U.S.C. 608c(15)(A) 8, 15, 17, 19

Tucker Act:

28 U.S.C. 1491(a)(1) 7, 9

28 U.S.C. 1346(a)(2) 9

Regulations—Continued: Page

Marketing Order Regulating the Handling of Raisins Produced from Grapes Grown in California, 7 C.F.R. Pt. 989: 2
Section 989.11 3
Section 989.15 ..... 3, 5
Section 989.26 3
Section 989.29 3
Section 989.30 3
Section 989.54(d) 2, 3
Section 989.55 3
Section 989.65 ..... 2, 3
Section 989.66(a) 3, 16
Section 989.66(h) 4, 13
Section 989.67 3
Section 989.166(c) 5, 13

In the Supreme Court of the United States

No. 12-123

MARVIN D. HORNE, ET AL., PETITIONERS

v.

UNITED STATES DEPARTMENT OF AGRICULTURE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The amended opinion of the court of appeals (Pet. App. 1a-23a) is reported at 673 F.3d 1071. The court of appeals' earlier decision prior to amendment (Pet. App. 26a-54a) is unreported, but is available at 2011 WL 2988902. The opinion of the district court (Pet. App. 55a-119a) is unreported, but is available at 2009 WL 4895362.

JURISDICTION

The original judgment of the court of appeals was entered on July 15, 2011. Pet. App. 27a. The court of appeals denied rehearing, and issued an amended opinion, on March 12, 2012. *Id.* at 25a. On June 1, 2012, Justice Kennedy extended the time within which to file a petition for a writ of certiorari to and including July 25,

2012, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Agricultural Marketing Agreement Act of 1937 (AMAA), 7 U.S.C. 601 *et seq.*, was enacted during the Great Depression to help farmers obtain fair value for their products and to aid consumers by avoiding unreasonable fluctuations in prices. 7 U.S.C. 602(1)-(2); Pet. App. 4a. The AMAA "contemplates a cooperative venture" involving the Secretary of Agriculture, "producers" (who grow the agricultural goods), and "handlers" (who process the agricultural goods and bring them to market), "the principal purposes of which are to raise the price of agricultural products and to establish an orderly system for marketing them." *Block* v. *Community Nutrition Inst.*, 467 U.S. 340, 346 (1984). To achieve those goals, the Secretary promulgates "marketing orders" that regulate the sale of commodities that are particularly vulnerable to market fluctuations. See 7 U.S.C. 608c; Pet. App. 4a-5a.

This case concerns an order that regulates the market for California raisins. Pet. App. 1a-2a, 6a-9a & n.7; see Marketing Order Regulating the Handling of Raisins Produced from Grapes Grown in California, 7 C.F.R. Pt. 989. The California raisin industry accounts for 99.5% of the domestic supply, and 40% of the world's supply, of raisins. Pet. App. 7a n.7. The order was first issued in 1949, following a spike in production that resulted in a price drop from $235 per ton to $40-$60 per ton. *Ibid.* The order stabilizes raisin prices by controlling raisin supply through the establishment of annual "reserve pools" of raisins that will not be released into the open domestic market. See 7 U.S.C. 608c(6)(E); 7 C.F.R. 989.54(d), 989.65. The raisin mar-

keting order, like other marketing orders under the AMAA, directly regulates only handlers (*e.g.*, raisin processors and packers) and does not directly regulate producers (*i.e.*, raisin farmers) "in [their] capacity as * * * producer[s]." 7 U.S.C. 608c(13)(B); see 7 U.S.C. 608c(1); Pet. App. 5a-6a; see also 7 C.F.R. 989.11 (defining "producer"); 7 C.F.R. 989.15 (defining "handler" to include, *inter alia*, "[a]ny processor or packer").

The raisin marketing order, among other things, creates a committee of industry-nominated representatives appointed by the Secretary of Agriculture, known as the Raisin Administrative Committee. 7 C.F.R. 989.26, 989.29, 989.30. Every year, the committee reviews the crop yield and recommends to the Secretary what portion (if any) should be made available for sale on the open market (the "free percentage") and what portion should be withheld (the "reserve percentage"). 7 C.F.R. 989.54(d), 989.55, 989.65. Based on the percentages (if any) set by the Secretary, the raisins that a handler receives from producers are divided into two groups: the "free tonnage" and the "reserve tonnage." 7 C.F.R. 989.65. The handler pays producers (at a predetermined price) for the free tonnage and may resell those raisins without restriction. *Ibid.*; *Lion Raisins, Inc.* v. *United States*, 416 F.3d 1356, 1360 (Fed. Cir. 2005); Pet. App. 8a. The reserve tonnage, however, must be held by the handler "for the account of the committee." 7 C.F.R. 989.66(a); *Lion Raisins*, 416 F.3d at 1360; Pet. App. 8a-9a. The committee can dispose of the reserve raisins in a variety of ways, such as sale in non-competitive markets (like school-lunch programs), and the proceeds from the reserve raisins are used to pay the costs of administering the reserve pool. 7 C.F.R. 989.67; *Lion Raisins*, 416 F.3d at 1360; Pet. App. 8a-9a. As compen-

sation for the reserve tonnage they deliver to handlers, producers receive an equitable share of any remaining profits after the committee's disposition of the reserve-pool raisins. 7 C.F.R. 989.66(h); Pet. App. 8a-9a.

2. Petitioners own and operate vineyards in California where they grow grapes and produce raisins. Pet. 7; Pet. App. 9a. Believing that the regulatory framework for raisins was outdated and unfair to farmers, they devised a scheme that sought to avoid the marketing order's reserve-percentage requirements. Pet. App. 9a-10a. Rather than selling their raisins to a third-party handler, petitioners instead "purchased their own equipment and facilities to clean, stem, sort, and package raisins." *Id.* at 10a. They used those facilities and equipment to process their own raisins, as well as raisins from more than 60 other growers (who paid a per-pound fee for the service). *Ibid.* Petitioners also organized those growers into an association that marketed and sold raisins on the growers' behalf. *Ibid.*

All told, petitioners' facilities processed over 3 million pounds of raisins during the 2002-2003 and 2003-2004 crop years. Pet. App. 10a. Petitioners, however, assumed the posture that they were only producers, and not handlers regulated by the raisin marketing order. Pet. 7-8. They accordingly declined to reserve any of the raisins they processed during those years, and they also did not comply with a number of other requirements of the marketing order. Pet. 8; see Pet. App. 10a-11a.

The Administrator of the Agricultural Marketing Service (a division of the United States Department of Agriculture (USDA)) subsequently brought an administrative enforcement action against petitioners for violations of the raisin marketing order. Pet. App. 11a. The

USDA Judicial Officer found petitioners liable for several violations, including the failure to hold aside reserve raisins. *Ibid.* With respect to that violation, petitioners were ordered to pay $483,843.53 in civil penalties. *Ibid.*; *id.* at 186a; see 7 C.F.R. 989.166(c) (specifying that a handler who does not comply with the reserve requirements "shall compensate the Committee for the amount of the loss resulting from his failure to so deliver").

3. Petitioners sought judicial review of the agency's decision in the United States District Court for the Eastern District of California. Pet. App. 11a-12a; see 7 U.S.C. 608c(14)(B) (judicial review provision for orders assessing civil penalties). Petitioners argued, among other things, that they were not handlers subject to the marketing order, Pet. App. 72a, and that "the reserve raisin program * * * constitutes a physical taking of tangible property by the government without just compensation in violation of the Fifth Amendment," *id.* at 106a.

The district court granted summary judgment in favor of the government. Pet. App. 56a. It reasoned that petitioners met the regulatory definition of raisin handlers, 7 C.F.R. 989.15, because "substantial evidence demonstrates that [petitioners] engaged in stemming, sorting, cleaning, seeding, grading, or packaging of raisins within California," Pet. App. 74a. The court further concluded that "the transfer of title to the reserve tonnage does not constitute a physical taking." *Id.* at 114a (emphasis omitted).

4. The court of appeals affirmed. Pet. App. 26a-54a. It agreed with the district court that petitioners were handlers under the relevant regulation. *Id.* at 38a. It additionally rejected petitioners' argument that they

were "statutorily exempt from regulation because they also satisfy the regulatory definition of a 'producer.'" *Ibid.* The court observed that the AMAA only precludes the application of marketing orders "'to any producer in his capacity as producer,'" and reasoned that the AMAA thus "contemplates that an individual who performs both producer and handler functions may still be regulated in his capacity as a handler." *Ibid.* (quoting 7 U.S.C. 608c(13)(B)).

The court of appeals also agreed with the district court that petitioners' takings claim lacked merit. Pet. App. 39a-49a. The court observed that petitioners' takings argument was limited to an allegation that the "'direct appropriation' of their reserve-tonnage raisins * * * is a classic *physical* taking," *id.* at 42a, and concluded that petitioners had "suffered no compensable *physical* taking of any portion of their crops." *Id.* at 49a. The court reasoned that the reserve-pool requirement merely "impose[s] a condition on [petitioners'] *use* of their crops by regulating their sale," *id.* at 43a; that the requirement does not constitute a "direct appropriation" or "a forced seizure" of their raisins, *ibid.*; that the requirement applies only to those who (like petitioners) "voluntarily choose to send their raisins into the stream of interstate commerce," *ibid.*; that the requirement does not deprive petitioners of all economic use of their property, but only affects the narrow "right to sell their raisins," which implicates at most "one 'strand' in [petitioners'] bundle" of property rights, *id.* at 47a; that the requirement "does not deny raisin farmers all economically beneficial use of their raisins, * * * but only requires the delivery to the [committee] of a certain percentage of raisins prepared for market," *id.* at 48a; and that, rather than diminishing petitioners' economic use

of their raisins, the marketing order makes the raisin industry more profitable by depressing supply and thereby increasing raisin prices, *id.* at 49a.

5. The court of appeals denied rehearing en banc, but the panel issued an amended opinion. Pet. App. 25a; see *id.* at 1a-23a. The amended opinion omitted any discussion of the merits of petitioners' takings claim, concluding instead that the court lacked jurisdiction to address that claim. *Id.* at 14a-18a.

The court of appeals reasoned that the constitutional requirement to provide just compensation for a taking is satisfied so long as the government "provide[s] an adequate process" for obtaining such compensation. Pet. App. 15a (quoting *Bay View, Inc.* v. *AHTNA, Inc.*, 105 F.3d 1281, 1285 (9th Cir. 1997), which in turn quotes *Williamson Cnty. Reg'l Planning Comm'n* v. *Hamilton Bank*, 473 U.S. 172, 194 (1985)). The court explained that, with respect to the federal government, such process is provided by the Tucker Act, 28 U.S.C. 1491(a)(1), which permits plaintiffs to bring an action in the Court of Federal Claims against the United States seeking monetary compensation for government actions alleged to be takings. Pet. App. 15a-16a, 18a. Accordingly, "a takings claim against the government must be brought" under the Tucker Act "in the first instance, 'unless Congress has withdrawn the Tucker Act grant of jurisdiction in the relevant statute.'" *Id.* at 16a (quoting *Eastern Enters.* v. *Apfel*, 524 U.S. 498, 520 (1998) (plurality opinion)).

The court of appeals determined that the relevant statute here—the AMAA—did not withdraw Tucker Act jurisdiction over petitioners' takings claim. Pet. App. 16a-18a. The court stated that, if petitioners were bringing a takings claim in their capacities as raisin

handlers, then the AMAA would preclude a Tucker Act action, because the AMAA itself provides the exclusive mechanism for administrative and judicial review of a challenge by a handler to a marketing order. *Id.* at 16a-17a; see 7 U.S.C. 608c(15)(A). But the court reasoned that petitioners had brought their takings claim "not in their capacity as handlers but in their capacity as producers," because they had "allege[d] that the regulatory scheme at issue takes reserve tonnage raisins belonging to producers, not to handlers." Pet. App. 17a. "[N]othing in the AMAA," the court determined, "precludes [petitioners] from alleging in the Court of Federal Claims that the reserve program injures them in their capacity as producers," and petitioners were therefore required to first seek just compensation in that forum. *Id.* at 17a-18a.

ARGUMENT

The court of appeals correctly held that the AMAA's procedures for administrative and judicial review, which apply only to handlers, do not bar petitioner from bringing an action seeking compensation under the Tucker Act in their capacity as producers. Its decision does not conflict with any decision of this Court or any other court of appeals. No further review is warranted.

1. The Fifth Amendment's Just Compensation Clause provides that "private property [shall not] be taken for public use, without just compensation." U.S. Const. Amend. V. As this Court has explained, the Just Compensation Clause "does not proscribe the taking of property," but instead only "proscribes taking without just compensation." *Williamson Cnty. Reg'l Planning Comm'n* v. *Hamilton Bank*, 473 U.S. 172, 194 (1985). Just compensation need not "be paid in advance of, or contemporaneously with, the taking; all that is required

is that a 'reasonable, certain and adequate provision for obtaining compensation' exist at the time of the taking." *Ibid.* (quoting *Regional Rail Reorg. Act Cases*, 419 U.S. 102, 124-125 (1974)) (nested quotation marks omitted). When the government has provided such a procedure, "the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and been denied just compensation." *Id.* at 195.

With respect to the federal government, the Tucker Act, 28 U.S.C. 1491(a)(1), provides the requisite procedure for obtaining just compensation. The Tucker Act generally permits a plaintiff who believes that the government has taken his property without just compensation to bring an action against the United States seeking compensation in the Court of Federal Claims. 28 U.S.C. 1491(a)(1); see, *e.g.*, *Ruckelshaus* v. *Monsanto Co.*, 467 U.S. 986, 1016-1017 (1984); see also 28 U.S.C. 1346(a)(2) (conferring concurrent jurisdiction on federal district courts for claims up to $10,000). This Court has accordingly recognized that, as a general matter, "taking claims against the Federal Government are premature until the property owner has availed itself of the process provided by the Tucker Act." *Williamson Cnty.*, 473 U.S. at 195; see, *e.g.*, *Eastern Enters.* v. *Apfel*, 524 U.S. 498, 520 (1998) (plurality opinion); *Preseault* v. *ICC*, 494 U.S. 1, 11 (1990); *Monsanto Co.*, 467 U.S. at 1018 n.21.

Petitioners do not contest any of this. See, *e.g.*, Pet. 17.[1] They instead contend for two reasons that they need not file an action under the Tucker Act. Neither

---

[1] Petitioner's amici suggest that *Williamson County* should be overruled. Cato Inst. et al. Amicus Br. 16-23. This Court ordinarily does not consider arguments not raised by the parties, see, *e.g.*, *United Parcel Serv., Inc.* v. *Mitchell*, 451 U.S. 56, 60 n.2 (1981), and this case presents no reason to deviate from that practice.

contention has merit, and neither warrants further review.

2. Petitioners first contend (Pet. 16-28) that the rule requiring that a claim first be filed under the Tucker Act does not apply to a claim challenging "a requirement that a private party make a cash payment to the government." Pet. 17. But any such exception has no application here, because—contrary to petitioners' assertions—their takings claim below was not based on a cash-payment requirement.

In the courts below, petitioners consistently framed their Just Compensation Clause claim as an assertion that the government takes their *physical property* (namely, raisins they produce) without providing adequate compensation (because their equitable share of the proceeds from those raisins is insufficient reimbursement). The district court explained, for example, that petitioners "assert that raisins are personal, private property and the government has paid no just compensation for the reserve tonnage raisins that the USDA takes each year." Pet. App. 107a. The court of appeals understood petitioners' claim similarly, observing that petitioners "insist we need look no further than the [committee's] annual 'direct appropriation' of their reserve-tonnage raisins to conclude this is a classic *physical* taking"—*i.e.*, one in which the committee "'takes' some of their raisins," which constitute their "personal property." *Id.* at 42a.

That is also how petitioners described their argument in their petition for rehearing en banc, in which they asserted that their "raisins are personal property," and that the government "takes title to" a percentage of that property "and uses it for government purposes, such as school lunches." Pet. App. 271a, 273a. The result, peti-

tioners argued, is "an out-and-out compelled transfer of ownership" of "a hefty portion of the producers' crop." *Id.* at 279a. In their reply supporting that petition, they again presented their claim as a challenge to the taking of "*goods* without compensation." *Id.* at 232a (emphasis added). Indeed, similar language also appears in their petition in this Court, which alleges that "raisin famers in California have been forced to turn over a hefty portion *of their crop* to the federal government" (Pet. 27 (emphasis added)), without just compensation, and describes petitioners' claim as challenging "takings of raisins" (Pet. 33).

Accordingly, at every relevant stage of this litigation below, petitioners described their claim (and the courts understood it) as challenging the taking of physical property, not money. The plurality decision in *Eastern Enterprises* v. *Apfel*, *supra*, relied upon by petitioners (Pet. 13-14, 17-18), concluded that the plaintiff was excused from filing a Tucker Act claim in a circumstance where a statute mandated a direct cash payment of over $5 million to the government, but expressly distinguished situations in which "the challenged statute * * * burden[s] real or physical property" rather than "requir[ing] a direct transfer of funds." 524 U.S. at 521; see *id.* at 517, 519-522.[2] The circuit cases relied on by petitioners (Pet. 19-22) recognize that same distinction.

---

[2] Petitioners assert (Pet. 14, 22-23) that the court of appeals' decision in this case erred in relying on a pre-*Apfel* circuit decision, *Bay View, Inc.* v. *AHTNA, Inc.*, 105 F.3d 1281 (9th Cir. 1997). But the court of appeals cited *Bay View* only twice, each time for propositions with which petitioners agree. See *id.* at 15a (citing *Bay View* for the proposition that just compensation need not be contemporaneous with the taking); *id.* at 18a (citing *Bay View* for the proposition that a Tucker Act action, when available, is the primary avenue for presenting a takings claim); compare Pet. 17, 24-25.

See *Asociacion de Subscripcion Conjunta del Seguro de Responsabilidad Obligatorio* v. *Flores Galarza*, 484 F.3d 1, 19-20 (1st Cir. 2007) (claim that government "improperly withheld money"); *Washington Legal Found.* v. *Texas Equal Access to Justice Found.*, 270 F.3d 180, 193 (5th Cir. 2001) (claim that government took "interest earned" on funds in certain accounts), vacated on other grounds *sub nom. Phillips* v. *Washington Legal Found.*, 538 U.S. 942 (2003); *Washlefske* v. *Winston*, 234 F.3d 179, 182-183 (4th Cir. 2000) (claim that government took interest earned on prisoner's account), cert. denied, 532 U.S. 983 (2001); *Student Loan Mktg. Ass'n* v. *Riley*, 104 F.3d 397, 399, 401-402 (D.C. Cir.) (claim that government took fees from certain accounts), cert. denied, 522 U.S. 913 (1997); *In re Chateaugay Corp.*, 53 F.3d 478, 493 (2d Cir.) (claim that government took money to pay for certain benefits), cert. denied, 516 U.S. 913 (1995).

Having consistently alleged an unconstitutional taking of raisins, petitioners cannot now contend that their taking claim is actually a challenge to the administrative order requiring them to "pay a fine" for their noncompliance with the raisin marketing order's reserve-pool requirements. *E.g.*, Pet. 22. Those two challenges are not the same thing. First, whereas the civil penalties and other monetary assessments were imposed on petitioners in their capacity as *handlers*, the disposition of reserve raisins affects petitioners only in their capacity as *producers*. See pp. 15-16, *infra* (explaining that handlers never take ownership of reserve raisins, but instead simply hold them on the committee's behalf). Second, the amount of the civil penalties and other assessments imposed on petitioners under the AMAA and the marketing order for their failure to comply with the re-

serve-pool requirements is not necessarily the same as the amount they might obtain if they were to prevail on their takings claim concerning the raisins. A monetary assessment under the order, for instance, is determined by "multiplying the quantity of reserve raisins not delivered by the latest weighted average price per ton received by producers during the particular crop year for free tonnage raisins of the same varietal type or types, plus any charges already paid or credited to the handler and cost incurred by the Committee on account of the handler's failure to deliver." 7 C.F.R. 989.166(c). By contrast, one possible measure of the potential compensation on a takings claim would be the fair market value or other value of the reserve raisins on the date the committee acquired them (which might or might not be the predetermined price that handlers pay to producers for free-tonnage raisins), minus the value of the equitable interest that petitioners received in exchange for the reserve raisins, see *Kirby Forest Indus., Inc.* v. *United States*, 467 U.S. 1, 10 (1984); 7 C.F.R. 989.66(h), and then perhaps further taking into account the benefits conferred on petitioners by, and the public interest served, by the regulatory program.[3]

Even if petitioners could change their theory of the case at this late date, it would demonstrate no error in the decision of the court of appeals, which properly understood petitioners—consistent with their own representations at the time—to be basing their takings claims on allegations concerning the government's alleged physical acquisition of raisins. See pp. 10-11, *supra*; see

---

[3] Petitioners thus err in suggesting that an action under the Tucker Act would be a "'pointless'" action "to recover the exact same amount of money as the fine." Pet. 25-26 (quoting *Apfel*, 524 U.S. at 521 (plurality opinion)).

also Pet. App. 14a (stating that petitioners challenged "the requirement that they contribute a specified percentage of their annual raisin crop to the government-controlled reserve pool"). Presenting their claim in that fashion was presumably a strategic decision, because a Just Compensation Clause challenge to the Secretary's enforcement order would be insubstantial. The order simply imposes civil penalties and other monetary assessments on petitioners for failure to comply with the marketing order, and the remedy is explicitly tied to the size, nature, and number of petitioners' violations. *Id.* at 186a; see *id.* at 178a-187a. Petitioners identify no reason why the imposition of a civil penalty and other assessments for noncompliance with a regulatory scheme constitutes a taking of property without just compensation.

To the extent petitioners might argue that the particular penalty here is unconstitutional because it was imposed for failure to comply with a regulation (the reserve-pool requirement) that itself violates the Just Compensation Clause, that argument would simply be an end-around to the principles discussed above concerning initial resort to the Tucker Act. See pp. 8-9, *supra*. No taking without just compensation could have occurred for the years to which the USDA enforcement order relates, because (1) petitioners never reserved any raisins in those years (instead selling all of them on the market), so no property could have been "taken"; and (2) even if raisins had been reserved, petitioners never sought just compensation for them under the Tucker Act, let alone received a determination from the Court of Federal Claims or the Federal Circuit that compensation was unavailable under that Act, see, *e.g.*, *Williamson Cnty.*, 473 U.S. at 195; *Monsanto Co.*, 467 U.S. at

1018 n.21. Petitioners cannot flout the raisin marketing order and then challenge the resulting monetary assessments on the ground that compensation might hypothetically be owed if they had complied.

3. Petitioners alternatively contend (Pet. 28-34) that they are excused from having to seek just compensation under the Tucker Act because Congress has affirmatively precluded them from pursuing a Tucker Act remedy. The court of appeals correctly concluded that the AMAA's special procedures for administrative and judicial review do not bar petitioners from bringing an action under the Tucker Act seeking just compensation for an alleged taking of raisins under the raisin marketing order. Pet. App. 16a-18a. As the court of appeals recognized, the AMAA affirmatively bars Tucker Act suits by *handlers*, at least in certain circumstances (see pp. 18-19, *infra*), because the AMAA's own procedures for administrative and judicial review of a legal challenge to a marketing order by "[a]ny handler subject to" that order, 7 U.S.C. 608c(15)(A), are exclusive. Pet. App. 16a-17a. But that provision does not, by its terms, apply to claims by *producers*. And here, petitioners' Just Compensation Clause claim is brought in their capacity as producers, not as handlers. *Id.* at 17a.

As discussed above (see pp. 10-11, *infra*), petitioners allege an unlawful taking of raisins without just compensation. They have standing to raise that claim only in their capacity as producers. Petitioners themselves have repeatedly contended that the effect of the reserve-pool requirements in the marketing order is to transfer title in the reserve raisins directly from producers to the committee. See, *e.g.*, Pet. 6 ("The USDA required *farmers* to turn over 47 percent and 33 percent of their raisin crop.") (emphasis added); Pet. 27 ("[F]or

decades, raisin *farmers* in California have been forced to turn over a hefty portion of their crop to the federal government in exchange for the 'privilege' of selling the remainder.") (emphasis added); Pet. App. 232a (arguing, in support of rehearing, that the marketing order "take[s] goods without compensation from a *producer*") (emphasis added); *id.* at 279a (arguing, in support of rehearing, that "[t]he government demands that raisin *producers* give a government committee ownership over a hefty portion of the *producers'* crop") (emphasis added). Handlers neither pay for, nor take title to, the reserve raisins, but instead are simply required to collect them from producers and hold them "for the account of the committee." 7 C.F.R. 989.66(a); see p. 3, *supra*. Handlers thus have no ownership interest that might be affected by the committee's acquisition of producers' raisins.[4]

Petitioners contend (Pet. 28-32) that because they are both producers *and* handlers, their Just Compensation Clause claim falls within the AMAA's review provision for handler claims, 7 U.S.C. 608c(15)(A). As a threshold matter, their argument on that point largely relies on

---

[4] Aside from the question whether the AMAA's special procedures for administrative and judicial review affirmatively foreclose a producer from seeking compensation under the Tucker Act, there is a substantial question whether Congress intended that the United States Treasury would compensate a private producer for any property interests thought to be taken by its voluntary participation in this regulatory regime for the benefit of private producers generally. Cf. *Eastern Enters.*, 524 U.S. at 521 (plurality opinion) (citing Brief for Federal Respondent 38-39 n.30). Neither the parties nor the court of appeals addressed that issue, and there is no reason for this Court to grant certiorari to address it in the first instance. See *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005) ("[W]e are a Court of review, not of first view.").

the incorrect proposition that their takings challenge below was to the monetary assessments (imposed on them in their capacity as handlers) rather than the committee's acquisition of raisins (which affects them only in their capacity as producers). In any event, petitioners are wrong to suggest that Section 608c(15)(A) covers claims by a producer, in its capacity as a producer, whenever the producer additionally happens to perform functions as a handler. The AMAA expressly recognizes that a single entity may function in multiple capacities. See 7 U.S.C. 608c(13)(B) (providing that no marketing order "shall be applicable to any producer in his capacity as a producer").[5]

Petitioners also contend (Pet. 25-26) that requiring them to challenge the Secretary's order in district court while requiring them to raise their Just Compensation Clause claim in the Court of Federal Claims in the first instance is unduly burdensome and unnecessarily bifurcates their claims. Pet. 25-26. But those are different legal claims, brought in different legal capacities, and petitioners' position is a result of their own voluntary

---

[5] Petitioners note (Pet. 31) that the AMAA makes specific references to "producer-handlers" in the context of milk, but not in the context of other agricultural products. See 7 U.S.C. 608c(5)(K), (M) and (O). Nothing suggests, however, that Congress intended the concept of a combined producer-handler to be unique to milk. Congress employed the term without any special definition particular to milk, and the AMAA recognizes as a general matter that a producer may sometimes act "in his capacity as a producer" and sometimes not. 7 U.S.C. 608c(13)(B). Petitioners' apparent belief that, for statutory purposes, an entity must be either a producer or a handler, but cannot be both, would create anomalous results. For example, if petitioners were always considered handlers, irrespective of context, they would lack certain voting rights with respect to agricultural regulation. See 7 U.S.C. 608c(8)-(9).

choice to assume two different roles under the AMAA. That choice does not entitle them to a special jurisdictional rule. Although petitioners accuse (Pet. 32) the government of trying to "have it both ways," no inconsistency arises from treating them as handlers when they act as handlers and producers when they act as a producers. Rather petitioners are simply subject, in each context, to the particular benefits and burdens of the role they have assumed.

Contrary to petitioners' contention (Pet. 33), the court of appeals' decision in this case is consistent with the Federal Circuit's decision in *Lion Raisins, Inc.* v. *United States*, 416 F.3d 1356 (2005). *Lion Raisins* involved two claims, brought in the Court of Federal Claims under the Tucker Act, by an entity that was "both a producer and a handler" of raisins. *Id.* at 1361 n.2; see *id.* at 1357-1358, 1361. The plaintiff had brought the first claim, which challenged the distribution of reserve-pool proceeds, "in its capacity as a raisin producer" (and was joined in that claim by another entity that was "only a raisin producer"). *Id.* at 1361 & n.2. The Federal Circuit concluded that dismissal of that claim was proper because, although it was styled as a takings claim, it was "premised on the allegations that the [raisin committee] violated the [governing] statute and regulations," and "a claim premised on a regulatory violation does not state a claim for a taking." *Id.* at 1369-1371; see also *id.* at 1373 ("The reserve pool case is properly dismissed for failure to state a Fifth Amendment takings claim."). The plaintiff also had brought a second claim, which sought reimbursement for missing storage bins that had been used to hold reserve raisins, "only in its capacity as a handler." *Id.* at 1361, 1370. The Federal Circuit concluded that dismissal of that

claim was proper because Section 608c(15)(A) provided the exclusive avenue for relief on that claim and thus precluded a Tucker Act suit. *Id.* at 1371-1373.

Nothing in the disposition of either claim at issue in *Lion Raisins* suggests that, if a producer were to bring a Just Compensation Clause claim in its capacity *as a producer*, the Federal Circuit would conclude that the recovery of compensation under the Tucker Act would necessarily be foreclosed. Indeed, the Federal Circuit's disposition of *Lion Raisins* supports the distinction drawn in the decision below between claims in a producer capacity and claims in a handler capacity. No further review of the decision below is warranted.[6]

---

[6] The petition discusses two matters outside the scope of the questions presented, neither of which provides a reason for granting certiorari. First, it criticizes the court of appeals, both for amending its opinion while denying petitioners a sur-sur-reply brief and a second rehearing petition, and for neglecting to amend the final sentence of the opinion to reflect that the district court's judgment was affirmed only in part. *E.g.*, Pet. 15-16. Petitioners' fact-bound complaints do not justify review of the questions that petitioner actually presents, see Pet. i, and the court of appeals made clear that petitioners are free to seek compensation under the Tucker Act. Second, the petition asserts (Pet. 28) that this case would be an "ideal vehicle" for addressing the merits of their Just Compensation Clause claim. But the questions presented concern jurisdiction, not the merits, see Pet. i, and in any event, largely for the reasons explained by the court of appeals in its original opinion (Pet. App. 39a-49a), the reserve-pool requirement—which functions essentially as an in-kind tax or service fee on the sale of raisins by producers—does not violate the Just Compensation Clause.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General
STUART F. DELERY
Acting Assistant Attorney General
MICHAEL S. RAAB
JOSHUA WALDMAN
Attorneys

OCTOBER 2012

REPLY BRIEF

DO NOT REMOVE FROM LL NOR

Supreme Court, U.S.
FILED
NOV - 5 2012
OFFICE OF THE CLERK

No. 12-123

In the Supreme Court of the United States

MARVIN D. HORNE, ET AL.,

Petitioners,

v.

UNITED STATES DEPARTMENT OF AGRICULTURE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR PETITIONERS

BRIAN C. LEIGHTON
Attorney at Law
701 Pollasky Avenue
Clovis, CA 93612
(559) 297-6190

MICHAEL W. MCCONNELL*
ADITYA BAMZAI
Kirkland & Ellis LLP
655 Fifteenth Street, N.W.
Washington, DC 20005
(202) 879-5000
michael.mcconnell@kirkland.com
**Counsel of Record*

Counsel for Petitioners

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

TABLE OF CONTENTS

Page(s)

TABLE OF AUTHORITIES ii

REPLY BRIEF 1

I. This Court Should Resolve The Circuit Split Over Whether A Party May Raise A Takings Clause Defense To A "Direct Transfer Of Funds." 2

A. The Courts Of Appeals Are Split Over The Scope Of *Williamson County*. 2

B. The Government's Efforts To Manufacture A Vehicle Problem Lack Merit. 4

C. The Government's Remaining Arguments Either (1) Disagree With *Apfel*, Or (2) Are Irrelevant To Ripeness. ... 5

D. The Case Presents A Recurring Question Of National Importance. 8

II. This Court Should Resolve The Circuit Split Over Whether, Under The AMAA, A Producer-Handler Of Raisins Must Bring Its Takings Claim In Administrative Proceedings Or Under The Tucker Act. 10

CONCLUSION 12

TABLE OF AUTHORITIES

Page(s)

Cases

Bay View, Inc. v. AHTNA, Inc.,
105 F.3d 1281 (9th Cir. 1997) 2, 3

Block v. Community Nutrition Institute,
467 U.S. 340 (1984) 11

Eastern Enterprises v. Apfel,
524 U.S. 498 (1998) 1, 2, 3, 5, 7

Lion Raisins, Inc. v. United States,
416 F.3d 1356 (Fed. Cir. 2005) 11, 12

Simon & Schuster, Inc. v. N.Y. State Crime Victims Board,
502 U.S. 105 (1991) 7

Wilkie v. Robbins,
551 U.S. 537 (2007) 7

Williamson County Regional Planning Commission v. Hamilton Bank,
473 U.S. 172 (1985) 1, 2, 3, 5, 8, 9

Wisconsin v. Yoder,
406 U.S. 205 (1972) 7

Statutes and Regulations

7 U.S.C. § 608c(15)(A) 11, 12

7 C.F.R. § 900.51(i) 11

REPLY BRIEF

The Government's response provides no justification for the Ninth Circuit's incongruous jurisdictional holding: A private party cannot raise the Takings Clause as a defense against imposition of a monetary penalty, but must litigate all other statutory and constitutional defenses in one action, pay the monetary penalty, and then bring a second, subsequent action to recover the money in the Court of Federal Claims. According to the panel, the takings defense to the monetary penalty is not *ripe* — as a *constitutional* matter under this Court's precedents — until the second lawsuit has been brought.

This extension of *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985), to cover defenses to monetary penalties conflicts with the reasoning of a plurality of this Court and the holdings of five courts of appeals. In *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998), a plurality concluded that a private party could enjoin, under the Takings Clause, a "direct transfer of funds mandated by the Government." *Id.* at 521. Both the *Apfel* plurality and Justice Kennedy's concurrence recognized that this issue "has divided the Courts of Appeals." *Id.* at 547 (Kennedy, J., concurring in the judgment and dissenting in part); *see also id.* at 520-521 (plurality). The panel relied on Ninth Circuit precedent repudiated by the *Apfel* plurality, thereby exacerbating the existing circuit split.

The Government insists that the petition does not implicate the split because "[petitioners'] takings claim below was not based on a cash-payment requirement." Resp. 10. That characterization is wrong. Petitioners have *always* argued that they

challenge the imposition of a penalty that violates the Takings Clause because it was imposed for failure to comply with a regulation that itself violates the Clause.

Certiorari is also warranted to review a second circuit split that would independently have given the courts below jurisdiction over petitioners' takings claim. As "handlers" of raisins under the Agricultural Marketing Agreement Act ("AMAA"), petitioners must bring their claims (including takings claims) in administrative proceedings rather than the Court of Federal Claims.

The petition for a writ of certiorari should be granted.

I. This Court Should Resolve The Circuit Split Over Whether A Party May Raise A Takings Clause Defense To A "Direct Transfer Of Funds."

A. The Courts Of Appeals Are Split Over The Scope Of *Williamson County*.

1. Both the *Apfel* plurality and Justice Kennedy's concurrence recognized a split of authority on whether federal courts have jurisdiction to enjoin "direct transfer[s] of funds mandated by the Government" under the Takings Clause. 524 U.S. at 520-521; *id.* at 547 (Kennedy, J., concurring in the judgment and dissenting in part) (noting the question "has divided the Courts of Appeals," but finding it "unnecessary to comment upon the plurality's effort to resolve [the] jurisdictional question"). The plurality specifically referred to and disapproved of *Bay View, Inc. v. AHTNA, Inc.*, 105 F.3d 1281 (9th Cir. 1997). Before and after *Apfel*, five circuit courts have echoed the plurality's conclusion that a takings claim to enjoin a

transfer of funds is immediately ripe. *See* Pet. 19-22.

2. Notwithstanding that body of law, the panel relied on *Bay View* to hold that petitioners' Takings Clause defense against the monetary penalty is constitutionally unripe. Seeking to minimize this reliance, the Government argues that the opinion cites "*Bay View* only twice, each time for propositions with which petitioners agree." Resp. 11 n.2. The Government is incorrect. The panel cited *Bay View* for the proposition that *Williamson County* categorically holds that "the just-compensation requirement does not force the government to provide immediate compensation at the time of a taking; 'it must simply "provide an adequate process for obtaining compensation."'" Pet. App. 15a (quoting 105 F.3d at 1285). As petitioners explained in some detail, they *do* disagree with that proposition insofar as *Apfel* requires immediate compensation when the Government seeks, as in this case, a "direct transfer of funds." Had the panel recognized *Apfel*'s rule, it could not have relied on *Bay View*.

Further proving *Bay View*'s centrality to the opinion below, the panel held that "*Bay View* makes clear that we lack jurisdiction to address the merits of [petitioners'] takings claim where Congress has provided a means for compensation." Pet. App. 18a. Petitioners disagree. A private party may enjoin a "direct transfer of funds" under the Takings Clause notwithstanding the availability of a separate Tucker Act claim for compensation.

In short, the panel adopted *Bay View*'s jurisdictional holding and exacerbated the acknowledged conflict within the circuits.

B. The Government's Efforts To Manufacture A Vehicle Problem Lack Merit.

The Government primarily argues that this circuit split does not apply here because petitioners' "takings claim below was not based on a cash-payment requirement." Resp. 10. That is a mischaracterization. This entire litigation has been about a cash fine imposed on petitioners for their failure to comply with a regulation that is unconstitutional under the Takings Clause. Indeed, when the Government raised its jurisdictional theory for the first time, on petition for rehearing after the panel had decided the case on the merits, petitioners responded that their lawsuit was "not a suit seeking money damages, nor a suit to enjoin a taking; it is an administrative appeal from an agency order on the ground that it constitutes a taking." Pet. App. 236a. Given the extensive review that the Government has evidently conducted of petitioners' lower-court briefing, the Government's failure to mention this point is curious indeed. *Compare* Resp. 13 (asserting that "petitioners cannot now contend that their taking claim is actually a challenge to the administrative order").

Petitioners' takings claim is straightforward: The Raisin Marketing Order's yearly requirement that petitioners hand over raisins with little or no compensation is an unconstitutional taking without just compensation. Believing themselves not subject to that Order, petitioners did not comply with that requirement in the years relevant to this case. When they were fined the dollar equivalent of the raisins, they raised a takings defense arguing that imposing the penalty violated the Takings Clause because the regulation itself violated the Clause. Just as a fine for disobeying an improper speech-restrictive ordin-

ance violates the Speech Clause, a fine for violating an order to give the government property without compensation violates the Takings Clause. Under *Apfel*, the constitutional defense is ripe when the government seeks to impose the fine.

Nothing the Government identifies in petitioners' pleadings below is inconsistent with that straightforward argument. Indeed, petitioners' statements that "raisins are personal property" and that the government "takes title to" and "uses" that property "for government purposes" are part and parcel of petitioners' jurisdictional argument. Resp. 10. Petitioners have argued that the Order takes physical property and that a monetary penalty imposed to enforce the Order is unconstitutional because the Order is unconstitutional. The Government's attempt to obfuscate that claim should be rejected.

C. The Government's Remaining Arguments Either (1) Disagree With *Apfel*, Or (2) Are Irrelevant To Ripeness.

1. The Government says that petitioners' argument "would simply be an end-around to . . . initial resort to the Tucker Act" under *Williamson County*. Resp. 14. But *Apfel* and five other courts of appeals create an *exception* to *Williamson County* in the case of direct transfers of money. Describing that exception as an "end-around" is not a response to the cases but rather an ingenious way of expressing disagreement with the jurisdictional rule applied in *Apfel* and other circuits.

Likewise, the Government argues that no unconstitutional taking has occurred "because (1) petitioners never reserved any raisins in those years (instead selling all of them on the market), so no property

could have been 'taken'; and (2) even if raisins had been reserved, petitioners never sought just compensation for them under the Tucker Act." Resp. 14. These arguments are non-responsive. Of course, petitioners "never reserved any raisins" — they believed the Order did not apply to them at all. And "petitioners never sought just compensation" under the Tucker Act because no such requirement exists in the five circuits in which petitioners can immediately raise a takings challenge to a "direct transfer of funds." The Government's disagreement with this jurisdictional rule is reason to grant certiorari, not to deny it.

2. The Government's other arguments are irrelevant to constitutional ripeness. The Government argues that petitioners cannot challenge the imposition of the monetary penalty because, "whereas the civil penalties and other monetary assessments were imposed on petitioners in their capacity as *handlers*, the disposition of reserve raisins affects petitioners only in their capacity as *producers*." Resp. 12. Leaving to one side the validity of this distinction (*see infra* at pp. 10-12), the Government nowhere explains its relevance to the question whether a defense to enjoin government action as a taking is *constitutionally* ripe. Constitutional ripeness does not depend on these statutory definitions.

The Government also argues that "the amount of the civil penalties . . . is not necessarily the same as the amount [petitioners] might obtain if they were to prevail on their takings claim," Resp. 12-13, in part because any compensation award may "tak[e] into account the benefits conferred on petitioners, and the public interest served, by the regulatory program," *id.* at 13. Once again, leaving to one side the Government's dubious assertions regarding calculation of

the award, the point is irrelevant to the question of constitutional ripeness. The same could have been said in *Apfel* or any of the other courts of appeals cases, yet none hinted that constitutional ripeness depends on the size of the compensation awards.

The Government's statement that "[p]etitioners cannot flout the raisin marketing order and then challenge the resulting monetary assessments" (Resp. 15) also misses the point. The question presented by the petition is whether the federal courts have jurisdiction to address petitioners' takings defense to the imposition of a fine. Whether that takings defense succeeds on the merits is a separate question.

At any rate, the Government is wrong about the viability of petitioners' takings claim on the merits. It is black-letter law that a party may challenge a monetary penalty on constitutional grounds when the fine is predicated on unconstitutional governmental action. *See, e.g., Simon & Schuster, Inc. v. N.Y. State Crime Victims Board*, 502 U.S. 105 (1991); *Wisconsin v. Yoder*, 406 U.S. 205 (1972). The law is no different for takings claims. *See, e.g., Wilkie v. Robbins*, 551 U.S. 537, 583 (2007) (Ginsburg, J., dissenting) ("Correlative to the right to be compensated for a taking is the right to refuse to submit to a taking where no compensation is in the offing."). Under the Government's contrary theory, any private individual who "flouts" the regulatory scheme — or, as in petitioners' case, structures their business in a way that they believe does not implicate the regulatory scheme — would have no takings claim on the merits when the Government later imposes a monetary penalty. Unsurprisingly, the Government cites nothing to support this novel position.

3. The Government nowhere responds to petitioners' broader point that ripeness is a jurisdictional defense to a premature claim, and cannot be used as a sword to prevent a party from asserting available defenses. *Williamson County* depends on the premise that when the government takes property, it is not yet known whether compensation is forthcoming; a proper claim under the Tucker Act is a necessary predicate to the existence of a controversy. Where the government demands payment by haling a private party into court or administrative proceedings, by contrast, the Takings Clause defense is in no way premature: the government's claim creates the case or controversy.

D. The Case Presents A Recurring Question Of National Importance.

1. The Government's response confirms that the decision below extends *Williamson County* (a decision that has received substantial criticism, *see* Cato Inst. *et al. Amicus* Br. 16-23) beyond reason, by imposing on property owners a "two lawsuit" requirement — one lawsuit to litigate all statutory and other constitutional claims, and a second to litigate a takings claim.

That proliferation of lawsuits creates great economic hardship for parties like petitioners. The modern administrative state imposes countless requirements that a private party dispose of property in a particular way, and an equally large number of penalty provisions enforcing those requirements. Under the panel's logic, as a matter of *constitutional* law, any Takings Clause defense would be bifurcated from other statutory and constitutional defenses, with one trip through the federal courts and then

another through the Court of Federal Claims. It is hard to see anything to recommend such bifurcation, which can only dissuade injured persons from seeking redress. It remains in this Court's hands to ensure that *Williamson County* does not become a tool to suppress valid takings claims.

2. The Government's statements on the merits of petitioners' takings claim illustrate the sweeping nature of the legal theory that has kept in place — for decades — a regulatory regime that requires raisin farmers to turn over a large percentage of their crop to the federal Government for little or no compensation. In an industry that "accounts for 99.5% of the domestic supply, and 40% of the world's supply, of raisins," Resp. 2, the Government announces that it has the unchecked power to appropriate nearly fifty percent of petitioners' harvest with below-cost-of-production or even zero compensation. Absent this Court's intervention, this intrusive and unconstitutional federal regulatory regime is likely to remain in place for the foreseeable future.

The Government argues that the regime does not violate the Takings Clause because it "functions essentially as an in-kind tax or service fee on the sale of raisins by producers." Resp. 19 n.6. If that were correct, however, there would be no constitutional limit to government power to take private property under the guise of an "in-kind tax or service fee." Such an easy reclassification of takings into taxes would render the Takings Clause a dead letter.

In a similar vein, the Government claims that "there is a substantial question whether Congress intended that the United States Treasury would compensate a private producer for any property interests

thought to be taken by its *voluntary* participation in this regulatory regime for the benefit of private producers generally." Resp. 16 n.4 (emphasis added). Petitioners' participation in the scheme, however, is "voluntary" only in the sense that they choose to produce raisins, after which the Government's regulation is mandatory in every sense of the word. If the Government could reclassify marketplace entry as a "voluntary" decision making a private person subject to massive governmental appropriations, all limits on the Takings Clause would be removed.

Because the jurisdictional questions presented in the petition are substantial, petitioners have not raised the merits of their takings claim in this petition. But the Government's full embrace of these extreme positions reinforces the need for this Court's intervention to ensure that a constitutional challenge to the Raisin Marketing Order is properly heard.

II. This Court Should Resolve The Circuit Split Over Whether, Under The AMAA, A Producer-Handler Of Raisins Must Bring Its Takings Claim In Administrative Proceedings Or Under The Tucker Act.

Certiorari is also warranted to address a second circuit split on an issue that would *independently* establish jurisdiction over petitioners' takings claim. The Government concedes that "the AMAA affirmatively bars Tucker Act suits by *handlers*," Resp. 15, and that the "monetary assessments" at stake here were "imposed on [petitioners] in their capacity as handlers," *id.* at 17. That ought to suffice to make the Tucker Act inapplicable. Yet, like the panel, the Government insists, without citation, that petitioners must bring their takings claim under the Tucker Act

because they "bring different legal claims, brought in different legal capacities" as a result "of their own voluntary choice to assume two different roles [handler and producer] under the AMAA." *Id.* at 17-18. This *ipse dixit* conflicts with the plain terms of the statute and a decision of the Federal Circuit — and would concededly have the irrational result of "bifurcat[ing] [petitioners'] claims," *id.* at 17.

Contrary to the Government's position, petitioners do not seek a "special jurisdictional rule," Resp. 18, but application of the plain terms of the AMAA and its accompanying regulations. The AMAA provides that "*[a]ny* handler" seeking to challenge an order, including on constitutional grounds, must exhaust administrative remedies. 7 U.S.C. § 608c(15)(A) (emphasis added). The Department of Agriculture has interpreted the term "handler" in this very provision to mean "any person who, by the terms of a marketing order, is subject thereto, or to whom a marketing order is sought to be made applicable." 7 C.F.R. § 900.51(i). The Government nowhere disputes that petitioners meet that definition. Indeed, "Congress intended that judicial review of market[ing] orders issued under the [AMAA] ordinarily be confined to suits brought by handlers in accordance with 7 U.S.C. § 608c(15)," *Block v. Community Nutrition Institute*, 467 U.S. 340, 348 (1984), where, as here, handlers "can be expected to challenge unlawful agency action and to ensure that the statute's objectives will not be frustrated," *id.* at 352.

Nor does the Government offer any principled basis for distinguishing *Lion Raisins, Inc. v. United States*, 416 F.3d 1356 (Fed. Cir. 2005). The Government concedes that *Lion Raisins* involved, in relevant part, a party that was "both a producer and a handler

of raisins," and a takings claim "for missing storage bins that had been used to hold reserve raisins." Resp. 18 (citation and quotation marks omitted). The Government also concedes that the Federal Circuit dismissed the claim "because Section 608c(15)(A) provided the exclusive avenue for relief on that claim and thus precluded a Tucker Act suit." Resp. 19.

Yet, apart from the conclusory assertion that the plaintiff in *Lion Raisins* brought *its* takings claim in its capacity as a handler whereas petitioners supposedly bring *their* takings claim in their capacity as producers, the Government provides no rationale why the jurisdictional rule should change from case to case and circuit to circuit. Taken together, *Lion Raisins* and the opinion below create a grave risk that petitioners will find *no* United States court with jurisdiction to adjudicate their takings claim.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

BRIAN C. LEIGHTON
Attorney at Law
701 Pollasky Avenue
Clovis, CA 93612
(559) 297-6190

MICHAEL W. MCCONNELL*
ADITYA BAMZAI
Kirkland & Ellis LLP
655 Fifteenth Street, N.W.
Washington, DC 20005
(202) 879-5000
michael.mcconnell@kirkland.com
**Counsel of Record*

Counsel for Petitioners

November 5, 2012

AMICUS CURIAE BRIEF

RECORD
AND
BRIEF:

No. 12-123

In the Supreme Court of the United States

MARVIN D. HORNE, ET AL.,
PETITIONERS

v.

UNITED STATES DEPARTMENT OF AGRICULTURE,
RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE CATO INSTITUTE, NATIONAL FEDERATION OF INDEPENDENT BUSINESS, CENTER FOR CONSTITUTIONAL JURISPRUDENCE, AND REASON FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF THE PETITION FOR CERTIORARI

WILLIAM P. FERRANTI
Winston & Strawn LLP
35 W. Wacker Drive
Chicago, IL 60601
(312) 558-5600

STEFFEN N. JOHNSON
Counsel of Record
JACOB R. LOSHIN
Winston & Strawn LLP
1700 K Street, N.W.
Washington, DC 20006
(202) 282-5000
sjohnson@winston.com

Counsel for Amici Curiae
[Additional Counsel Listed on Inside Cover]

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

Library of Congress
Law Library

ILYA SHAPIRO
Cato Institute
1000 Mass. Ave.
Washington, DC 20001
(202) 842-0200
ishapiro@cato.org

Counsel for Cato Institute

KAREN R. HARNED
ELIZABETH MILITO
NFIB Small Business Legal Center
1201 F St., NW, Ste. 200
Washington, DC 20004
(202) 406-4443
elizabeth.milito@nfib.org

Counsel for National Federation of Independent Business

JOHN C. EASTMAN
Center for Constitutional Jurisprudence
c/o Chapman University School of Law
One University Drive
Orange, CA 92886
(714) 628-2500
jeastman@chapman.edu

Counsel for Center for Constitutional Jurisprudence

MANUEL S. KLAUSNER
Law Offices of Manuel S. Klausner, P.C.
One Bunker Hill Bldg.
601 West Fifth Street
Los Angeles, CA 90071
(213) 617-0414
mklausner@klausnerinc.com

Counsel for Reason Foundation

QUESTION PRESENTED

Whether the Ninth Circuit erred in holding—contrary to the decisions of five other Circuit Courts of Appeals—that a party may not raise the Takings Clause as a defense to a "direct transfer of funds mandated by the Government," *Eastern Enterprises* v. *Apfel*, 524 U.S. 498, 521 (1998) (plurality), but instead must pay the money and then bring a separate, later claim requesting reimbursement of the money under the Tucker Act in the Court of Federal Claims.

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF AUTHORITIES iv

INTRODUCTION AND INTEREST OF *AMICI CURIAE* 1

STATEMENT 3

REASONS FOR GRANTING THE WRIT 6

I. In Conflict With Five Other Circuits And A Plurality Of This Court, The Ninth Circuit Has Expanded *Williamson County*'s Ripeness Rule Beyond Its Moorings. 6

A. When The Government Initiates Proceedings To Take Money, It Is Pointless To Burden The Property Owner With A Separate Suit For Compensation. 8

B. Obligating A Property Owner To Make An Unjustified Monetary Payment Is Inherently A Taking "Without Just Compensation." 11

C. Property Owners Should Not Have To Suffer A Violation Of Their Constitutional Rights Before Being Allowed To Raise Them. 14

II. *Williamson County* Should Be Overruled Because Its Premises Have Become Untenable. 16

A. The Text And History Of The Takings Clause Do Not Permit The Government To Defer Compensation Until After A Taking Occurs. 17

B. There Is No Reason To Treat The Takings Clause Differently From The Due Process Clause. 19

C. Deferring Compensation Until After A Taking Imposes Significant Burdens On Property Owners.....20

CONCLUSION 23

APPENDIX A: LIST OF *AMICI*..... 1a

TABLE OF AUTHORITIES

Page(s)

CASES

Abbott Labs. v. *Gardner*,
387 U.S. 136 (1967) 10

Albertson v. *Subversive Activities Control Bd.*,
382 U.S. 70 (1965) 14

Baker v. *McCollan*,
443 U.S. 137 (1979) 19

Bay View, Inc. v. *AHTNA, Inc.*,
105 F.3d 1281 (9th Cir. 1997) 6, 12

Bennis v. *Michigan*,
516 U.S. 442 (1996) 15

Bowles v. *United States*,
31 Fed. Cl. 37 (1994)..... 21

Carter v. *Carter Coal Co.*,
298 U.S. 238 (1936) 14

Church of the Lukumi Babalu Aye, Inc. v. *City of Hialeah*,
508 U.S. 520 (1993) 14

Duke Power Co. v. *Carolina Envtl Study Grp, Inc.*,
438 U.S. 59 (1978) 7, 15

Eastern Enterprises v. *Apfel*,
524 U.S. 498 (1998) .....passim

Estate of Hage v. *United States*,
2012 WL 3043001 (Fed. Cir. July 26, 2012) 20

Evans v. *United States*,
74 Fed. Cl. 558 (2006) 3

FCC v. *Fla. Power Corp.*,
480 U.S. 245 (1987) 15

Goldblatt v. *Town of Hempstead, N.Y.*,
369 U.S. 590 (1962) 16

Holman v. *City of Warrenton*,
242 F. Supp. 2d 791 (D. Or. 2002) 21

Hooper v. *California*,
155 U.S. 648 (1895) 10

In re Chateaugay Corp.,
53 F.3d 478 (2d Cir. 1995) 8, 12

Kaiser Aetna v. *United States*,
444 U.S. 164 (1979) 16

Lindsey v. *Normet*,
405 U.S. 56 (1972) 15

McDonald v. *City of Chicago*,
130 S. Ct. 3020 (2010) 14

Md. & Wash. Ry. Co.
v. *Hiller*,
8 App. D.C. 289 (C.A.D.C. 1896) 18

Mead v. *City of Cotati*,
2008 WL 4963048 (N.D. Cal. Nov. 19, 2008) 6

Nat'l Park Hospitality Ass'n v. *Dep't of the Interior*,
538 U.S. 803 (2003) 11

Parratt v. *Taylor*,
451 U.S. 527 (1981) 19

Payne v. *Tennessee*,
501 U.S. 808 (1991) 17

Pierce v. *Soc'y of Sisters*,
268 U.S. 510 (1925) 15

San Remo Hotel, L.P. v. *City & Cnty. of S.F., California*,
545 U.S. 323 (2005) 16, 17

Steffel v. *Thompson*,
415 U.S. 452 (1974) 14

United States v. *United Foods, Inc.*,
533 U.S. 405 (2001) 15

Wash. Legal Found. v. *Tex. Equal Access to Justice Found.*,
270 F.3d 180 (5th Cir. 2001) 12

Wilkie v. *Robbins*,
551 U.S. 537 (2007) 18

Williamson County Reg'l Planning Comm'n v. *Hamilton Bank of Johnson City*,
473 U.S. 172 (1985) .....passim

Zinermon v. *Burch*,
494 U.S. 113 (1990) 19, 20

STATUTES & REGULATIONS

7 U.S.C. § 602(4) (2006) 3

7 U.S.C. § 608c (2006) 3, 5, 9

7 C.F.R. § 989.26, ... 4

7 C.F.R. § 989.29 4

7 C.F.R. § 989.30 4

7 C.F.R. § 989.35 4

7 C.F.R. § 989.36 4

14 Fed. Reg. 5136 4

OTHER AUTHORITIES

Abraham Bell & Gideon Parchomovsky, *Taking Compensation Private*, 59 Stan. L. Rev. 871 (2007) 21

Robert Brauneis, *The First Constitutional Tort: The Remedial Revolution in Nineteenth-Century State Just Compensation Law*, 52 Vand. L. Rev. 57 (1999) 18

Dan Browning, *MnDOT's Tactics Squeeze Landowners*, Minneapolis Star Tribune (Sept. 20, 2003) 21

Dick M. Carpenter II & John K. Ross, *Victimizing the Vulnerable* 2 (2007) 22

Thomas M. Lenard & Michael P. Mazur, *Harvest of Waste: The Marketing Order Program* 3

Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 Harv. L. Rev. 1165 (1967) 23

Jillian Swords, *Eminent Domain Leaves Businesses Homeless* 22

INTRODUCTION AND INTEREST OF *AMICI CURIAE*

Amici, described in Appendix A, are advocates for individual freedom who believe that the right to keep and control one's own property is among the most fundamental rights protected by the Constitution, and that government should not make property owners suffer needless burdens in order to vindicate their rights.

This case involves one such burden. If the Ninth Circuit's decision is permitted to stand, property owners who have been wrongfully ordered to pay the Federal Government money—in proceedings the government itself initiated—will not at that time be permitted to invoke the Takings Clause in their defense. Instead, after litigating all other constitutional and statutory defenses, they will have to hand over their money to the government. They will then have to go to a different forum, the Court of Federal Claims, and file a separate suit against the government under the Tucker Act just to make their takings claims "ripe." Only then will a court decide whether the monies the property owners had to pay were unconstitutional takings. And if they were, only then will the property owners receive their money back.

This Rube Goldberg approach to adjudicating takings claims serves no valid purpose. And for that reason, a plurality of this Court squarely rejected it

---

* Pursuant to Rule 37.2(a), *amici* provided timely notice of their intention to file this brief. All parties have consented. In accordance with Rule 37.6, no counsel for any party has authored this brief in whole or in part, and no person or entity, other than the *amici*, has made a monetary contribution to the preparation or submission of this brief.

in *Eastern Enterprises* v. *Apfel*, 524 U.S. 498 (1998). The plurality—consisting of all Justices who reached the issue—rightly recognized that having to jump through such hoops to assert a takings claim "would entail an utterly pointless set of activities." *Id.* at 521 (quotation omitted). Five courts of appeals—the First, Second, Fourth, Fifth, and D.C. Circuits—have all agreed. Pet. 16-24. Only the Ninth Circuit cannot abide this result.

Certiorari is needed not only to resolve that conflict, but also to ensure that this Court's ripeness doctrine does not impose unnecessary burdens on property owners—an issue of significant national concern. In *Williamson County Regional Planning Commission* v. *Hamilton Bank of Johnson City*, 473 U.S. 172, 194-196 (1985), this Court held that a government taking of real or tangible personal property is not ripe to challenge until a property owner has sought monetary compensation for the property that has been taken. In federal cases, that means a suit for damages in the Court of Federal Claims under the Tucker Act. *Id.* at 195. But where a taking involves *money* rather than real or tangible property, *Williamson County*'s ripeness rule makes no sense—the government does not take money, only to give it right back in the form of "compensation." The plurality in *Apfel* thus recognized an exception for takings of money. And as we explain in Part I, certiorari should be granted to prevent *Williamson County*'s ripeness rule from being expanded beyond its original scope.

As we explain in Part II, however, *Williamson County* itself has not stood the test of time. Whether a taking involves money or some other tangible property, property owners should be allowed to challenge all uncompensated takings immediately after they

occur—without having to pursue unpromised compensation first. The time, expense, and uncertainty of trying to recover compensation after-the-fact is burdensome to property owners across the country. And *Williamson County*'s premise that compensation need not be paid at the time a taking occurs is both contrary to the text and history of the Takings Clause and inconsistent with this Court's treatment of similar deprivations under the Due Process Clause. This case presents an opportunity to reconsider *Williamson County*, and to return to a much more defensible rule—dating back to Magna Carta—that government takings of private property must be accompanied by "immediate payment." Magna Carta, Cl. 28 (1215).

STATEMENT

1. Since the New Deal, the federal government has heavily controlled the supply of agricultural products, ostensibly to prevent "unreasonable fluctuations in supplies and prices." 7 U.S.C. § 602(4) (2006); see *Evans* v. *United States*, 74 Fed. Cl. 554, 558 (2006). Under the Agricultural Marketing Agreement Act of 1937 and its implementing regulations, the United States Department of Agriculture ("USDA") issues "marketing orders" that manipulate prices by imposing production quotas or restricting supply. 7 U.S.C. § 608c (2006).

A much-criticized relic of the New Deal, these marketing orders are effectively government-enforced cartels that fine farmers who attempt to sell more than their allotted quotas, and that "deploy the legal powers of the government to manipulate supply in an effort to increase grower profits." See generally Thomas M. Lenard & Michael P. Mazur, *Harvest of*

Waste: The Marketing Order Program, Regulation, May/June 1985, at 21.[1]

2. This case involves the USDA's marketing order for raisins. 14 Fed. Reg. 5136. Under that order, "handlers" of raisins must reserve a certain portion of their crop, which they may not sell on the open market. The percentage of the crop that must be reserved each year is established by the USDA, based on the recommendations of a committee of industry representatives.[2] 7 C.F.R. §§ 989.35, 989.36. The percentage is announced annually on February 15, long after farmers have spent substantial resources to cultivate and harvest that year's crop. *Id.* §§ 989.21, 989.54(d).

Once the set-aside percentage has been set, those "reserve-tonnage" raisins must be physically segregated from the rest of the farmers' crop and held "for the account" of the Committee, which effectively takes title. *Id.* §§ 989.65, 989.66(a), (b)(1), (b)(2), (g). The Committee may then decide to sell the raisins or simply give them away to anyone it chooses. *Id.* § 989.66(h), (b)(4). During the relevant crop years, 2002-2003 and 2003-2004, farmers were not compensated for their reserve-tonnage raisins at even the cost of production—in fact, in 2003-2004, *they received no compensation at all.* Pet. App. 9a.

3. Petitioners are independent farmers in Fresno and Madera Counties. During 2002-2003 and 2003-

---

[1]Available at: www.cato.org/pubs/regulation/regv9n3/v9n3-4.pdf.

[2] The committee consists of forty-six industry representatives and *one* representative of the public. See 7 C.F.R. §§ 989.26, 989.29, 989.30.

2004, petitioners did not set aside the requisite reserve-tonnage raisins. They believed that the Raisin Marketing Order applied only to "handlers," and did not apply to them as "producers," as the statute defines those terms. Pet. App. 10a.

The government disagreed. It initiated an administrative enforcement action against petitioners, and the USDA ultimately found them liable for failing to give up their raisins. Pet. App. 11a, 121a, 145a. The USDA ordered petitioners to pay $438,843.53, the approximate market value of the raisins that allegedly should have been relinquished. Petitioners were also ordered to hand over $202,600 in civil penalties and $8,783.39 in unpaid assessments.

4. By statute, fines and penalties imposed for violations of a marketing order are reviewable in the federal district courts. 7 U.S.C. § 608c(14)(A)-(B), 608c(15)(A)-(B) (2006). Petitioners thus sought review of the USDA's decision, raising three claims: (1) that the requirement to give up their raisin crop, and the associated fines, violate the Takings Clause of the Fifth Amendment; (2) that the penalties imposed on them violate the Excessive Fines Clause of the Eighth Amendment; and (3) that the USDA misconstrued the Raisin Marketing Order in applying it to them. The district court granted summary judgment to the USDA. Pet. App. 55a.

5. Petitioners appealed, but the Ninth Circuit affirmed. In response to a petition for rehearing, the government argued for the first time that petitioners' takings claim would not be ripe until they complete this litigation, pay the fines, and sue for damages under the Tucker Act in the Court of Federal Claims.

The panel agreed with the government, issuing a revised opinion. Invoking *Bay View, Inc.* v. *AHTNA, Inc.*, 105 F.3d 1281 (9th Cir. 1997) and *Williamson County Regional Planning Commission* v. *Hamilton Bank*, 473 U.S. 172 (1985), the panel observed that "the Tucker Act allows parties seeking compensation from the United States to bring suit in the Court of Federal Claims." Pet. App. 15a. The panel then concluded that all takings claims—even challenges to direct transfers of money—"must be brought there in the first instance" because a takings claim is not ripe until a party has unsuccessfully sought compensation. *Ibid.* Although the panel's new opinion cited *Eastern Enterprises* v. *Apfel*, 524 U.S. 498 (1998) (plurality), it did not address *Apfel*'s conclusion that a takings defense to a direct transfer of funds is immediately ripe, without need to seek damages under the Tucker Act.[3]

REASONS FOR GRANTING THE WRIT

I. In Conflict With Five Other Circuits And A Plurality Of This Court, The Ninth Circuit Has Expanded *Williamson County*'s Ripeness Rule Beyond Its Moorings.

Certiorari should be granted to rein in the Ninth Circuit's overbroad reading of *Williamson County* and to firmly establish what a plurality of this Court and five circuits have recognized: When the government's

---

[3] Although the Ninth Circuit did not attempt to resolve the conflict between *Apfel* and its prior decision in *Bay View*, a district court has acknowledged the conflict, but applied *Bay View* on the ground that *Apfel*'s plurality opinion is not binding. *Mead* v. *City of Cotati*, 2008 WL 4963048 (N.D. Cal. Nov. 19, 2008).

demand of money from a property owner allegedly violates the Takings Clause, the takings claim is ripe immediately—without the owner's having to pay the money and file a separate suit to get it back.

In *Williamson County*, this Court reasoned that when the government "provides an adequate procedure for seeking just compensation" for the taking of *real property*, "the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure." 473 U.S. at 195. For this reason, real-property "taking claims against the Federal Government are premature until the property owner has availed itself of the process provided by the Tucker Act," which authorizes suing the United States for damages in the Court of Federal Claims. *Ibid.* But the Ninth Circuit—alone among the courts of appeals—has taken that rule to an indefensible extreme, applying it to takings of *money*. And it has held that the Tucker Act effectively divests it of *all* jurisdiction over any takings claims against the federal government, no matter how raised, even if asserted as a *defense* in an enforcement action initiated by the government.

Neither law nor common sense supports that extreme rule. Although the Tucker Act provides an exclusive remedy for damages claims against the government, it places no statutory limit on the right of individuals to seek declaratory or injunctive relief from unconstitutional government action in district court. *Duke Power Co.* v. *Carolina Envtl Study Grp, Inc.*, 438 U.S. 59, 71 n.15 (1978). Nor does it deprive individuals (such as petitioners) whom the government seeks to fine from arguing in their own defense that the fine is unconstitutional. Those ordinary remedies should be fully available where a taking,

"rather than burdening real or physical property, requires a direct transfer of funds" to the government. *Apfel*, 524 U.S. at 521 (quotation omitted). For at least three reasons, this Court should grant review and confirm that it makes no sense to deem such claims unripe.

A. When The Government Initiates Proceedings To Take Money, It Is Pointless To Burden The Property Owner With A Separate Suit For Compensation.

The most obvious reason not to extend *Williamson County*'s ripeness rule to takings of money is that requiring a separate suit for damages in such cases is pointless, inefficient, and burdensome.

When the government takes real or other tangible property from an individual, the Fifth Amendment requires "just compensation"—*i.e.*, an exchange of tangible property for money. In that context, a suit for damages under the Tucker Act serves as a mechanism for "obtaining compensation" for the value of the land or other piece of property that the government has taken. *Williamson County*, 473 U.S. at 194. But when the government takes *money* from an individual—by imposing a fine, penalty, or other obligation to pay—there is nothing to exchange. Rather, "[e]very dollar paid pursuant to a statute would be presumed to generate a dollar of Tucker Act compensation." *In re Chateaugay Corp.*, 53 F.3d 478, 497 (2d Cir. 1995). The only "just compensation" for a taking of money is to give the money right back.

Thus, as the plurality in *Apfel* recognized, requiring a separate suit for damages to recover money taken in a prior proceeding "would entail an utterly pointless set of activities." 524 U.S. at 521 (quotation

omitted). The property owner would have to pay the money to the government in one proceeding, and then file a separate suit under the Tucker Act to get the money back—all before it could argue that the money should not have been taken in the first place.

In addition to being pointless, requiring a separate suit for damages is also costly, burdensome, and inefficient. Where, as here, the Takings Clause is raised as a defense to a fine imposed by an agency, the Ninth Circuit's rule requires related claims to be adjudicated in two entirely separate proceedings. In this case, for example, petitioners would have to litigate all of their other statutory and constitutional defenses to the agency action in district court pursuant to applicable judicial review procedures. 7 U.S.C. § 608c(15)(B) (2006). If they did not prevail, petitioners would have to pay the fine levied against them. Only after handing over their money would petitioners then be able to begin a second round of litigation in the Court of Federal Claims to get it back, this time raising their takings defense.

This Rube Goldberg approach makes no sense. It requires courts to reach multiple potentially complex statutory and constitutional issues, while deferring a dispositive issue that may be more easily resolved. Cf., *e.g.*, *Apfel*, 524 U.S. at 538 (holding that because "the Coal Act's allocation scheme violates the Takings Clause as applied to Eastern, we need not address Eastern's due process claim"). And it requires property owners to run a gauntlet of successive, piecemeal litigation before receiving a final determination that they are entitled to keep their own money after all—no small burden for small raisin farmers such as petitioners, and an even larger burden for many other ordinary citizens.

Nor is it efficient for related issues to be resolved in two separate forums. The chief question in takings cases involving money is not how much money the government must pay to provide just compensation, as a dollar taken is a dollar owed. Instead, the question is whether a given statutory scheme or agency action effectuates a "taking" in the first place.

Making that determination often entails comprehensive analysis of a statutory scheme and its effect on property owners—the same kind of analysis district courts will typically undertake in judicial review proceedings addressing a property owner's other claims. See, *e.g.*, *Apfel*, 524 U.S. at 522-537 (examining the "economic impact of the regulation, its interference with reasonable investment backed expectations, and the character of the governmental action" to determine whether a taking has occurred). Not only is it inefficient to have two different courts, subject to the law of two different circuits, decide such overlapping issues, but it also invites confusion and further litigation over the collateral estoppel effect of portions of a prior decision. Further, it increases the difficulty of harmonizing a statutory scheme with the Constitution. If statutory and constitutional issues must be decided in separate proceedings, district courts will interpret statutes without regard to their constitutional problems; and the Court of Federal Claims will address those problems without being able to avoid them by adopting a saving construction. Contra *Hooper* v. *California*, 155 U.S. 648, 657 (1895) ("[E]very reasonable construction must be resorted to, in order to save a statute from unconstitutionality.").

The ripeness doctrine is supposed to ensure that disputes are resolved when they are most "fit[] ... for judicial decision." *Abbott Labs.* v. *Gardner*, 387 U.S.

136, 149 (1967). But the Ninth Circuit's rule does not serve that purpose. It requires takings claims to be raised when they are *least* fit for review. And it does so in a manner that is "utterly pointless," as there is simply no legal or factual question to be resolved in a Tucker Act suit that cannot be resolved earlier in the district court. *Apfel*, 524 U.S. at 521.

Indeed, it is worse than that. The United States itself initiated the underlying administrative proceedings that led petitioners to assert a taking, and no one disputes that this administrative process was exhausted. Yet, despite the imminent threat to petitioners' property, the government now says cases such as this are not "ripe"—requiring a separate lawsuit and necessitating a further outlay of resources that may or may not be cost-justified in any given case, depending on the amount being taken, and may or may not be reimbursed. Ripeness is a shield that protects the government from having to litigate hypothetical disputes; it is not a sword to deprive individuals of constitutional defenses in proceedings that the government itself has initiated. *Nat'l Park Hospitality Ass'n* v. *Dep't of the Interior*, 538 U.S. 803, 808 (2003) (deeming controversy ripe when "factual components [are] fleshed out ... in a fashion that harms or threatens to harm" a party). The government's invocation of ripeness in this context can only be described as Kafkaesque, and it finds no support in Article III of the Constitution. Review is warranted.

B. Obligating A Property Owner To Make An Unjustified Monetary Payment Is Inherently A Taking "Without Just Compensation."

Despite the pointless burden of requiring a property owner to seek compensation before challenging a

taking of money, the Ninth Circuit has justified it on the ground that "the government is not prohibited from taking private property ... so long as it pays compensation" eventually. *Bay View*, 105 F.3d at 1284-1285. Under this theory, the Fifth Amendment's prohibition on taking property "without just compensation" is not violated unless and until the government fails to pay compensation through the Tucker Act at some later date, and no takings claim is ripe until that occurs.

This theory is questionable even as applied to real or physical property (see *infra* Part II), but it is wholly implausible as applied to government-imposed fines or takings of money. As the Second Circuit has explained, "where the challenged statute requires a person or entity to pay money to the government, it must be presumed that Congress had no intention of providing compensation for the deprivation through the Tucker Act." *Chateaugay*, 53 F.3d at 493. This is "[c]ommon sense," as paying compensation for a monetary taking "would tend to nullify" the very government action that effectuated it. *Ibid.*; see also *Wash. Legal Found.* v. *Tex. Equal Access to Justice Found.*, 270 F.3d 180, 194 (5th Cir. 2001) (holding that, when the government takes money, "it would defy logic, to say the least, to presume the availability of a just compensation remedy").

Although it may be reasonable to assume that the government will pay money after it takes someone's land, it is absurd to assume that the government will return a fine after it has imposed one. As the plurality in *Apfel* recognized, "it cannot be said that monetary relief against the Government is an available remedy" for a monetary taking simply because the

Tucker Act authorizes suits for damages against the government. 524 U.S. at 521.

Williamson County does not contradict this logic. The Court there concluded that a property owner has no valid takings claim "[i]f the government has provided an adequate process for obtaining compensation, *and if resort to that process yields just compensation.*" 473 U.S. at 194 (quotation omitted, emphasis added). But in contrast to that case, where it was possible that Tennessee's inverse condemnation process would yield just compensation for the land taken, there is no reasonable possibility that resort to the Tucker Act would prompt the government to willingly return a fine.[4] To be sure, the government can be *compelled* to return a fine if the court in a Tucker Act suit ultimately deems the fine unconstitutional. But that conclusion does not *ripen* a constitutional issue; it merely *resolves* one—the exact same one that arises in a suit for declaratory or injunctive relief.

Simply put, a taking in the form of a fine or other monetary payment is inherently a taking "without just compensation." Unlike takings of real or tangible personal property, there is no reasonable possibility that "compensation" for a monetary taking will be forthcoming. Thus, there is no reason to consider the takings claim unripe when a monetary payment to the government is ordered. This Court's intervention is needed to make that clear.

---

[4] To the extent that the government does experience a change of heart, it can of course moot any takings claim for declaratory or injunctive relief by rescinding the fine. There is no need for a separate suit under the Tucker Act.

C. Property Owners Should Not Have To Suffer A Violation Of Their Constitutional Rights Before Being Allowed To Raise Them.

For takings of real or physical property, the Tucker Act may avoid constitutional injury by making genuine *compensation* available. But for takings that require the payment of money—an inherently uncompensated taking—the Tucker Act becomes something very different: It is just a means of recovering *damages* for a constitutional injury that has already occurred. Ripeness principles, however, have never required an individual to suffer a constitutional injury before bringing suit. It is enough to establish a realistic *threat* of injury.

As this Court explained long ago, one "does not have to await the consummation of threatened injury to obtain preventive relief." *Carter* v. *Carter Coal Co.*, 298 U.S. 238, 288 (1936). Rather, "[i]f the injury is certainly impending, that is enough." *Ibid.* In no other context must an individual suffer an imminent violation of his constitutional rights before he is permitted to assert them. See, *e.g.*, *Steffel* v. *Thompson*, 415 U.S. 452, 462-463 (1974) (permitting First Amendment challenge to criminal statute before prosecution); *Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520 (1993) (Free Exercise Clause); *McDonald* v. *City of Chicago*, 130 S. Ct. 3020, 3026-3027 (2010) (Second Amendment); *Albertson* v. *Subversive Activities Control Bd.*, 382 U.S. 70, 73-76 (1965) (Fifth Amendment right against self-incrimination); *Pierce* v. *Soc'y of Sisters*, 268 U.S. 510, 536 (1925) (substantive due process); *Duke Power*, 438 U.S. at 67-68, 81-82 (procedural due process).

That is particularly true where an individual asserts his constitutional rights as a *defense* in an enforcement action brought by the government. This posture involves none of the usual concerns about the justiciability of pre-enforcement review; enforcement has already commenced. It is thus highly anomalous to forbid an individual from raising a constitutional defense in proceedings that seek to impose a fine. Indeed, "[d]ue process requires that there be an opportunity to present every available defense." *Lindsey* v. *Normet*, 405 U.S. 56, 66 (1972) (quotation omitted).

When the government commences an enforcement action to impose a monetary penalty and one objects to that penalty on First Amendment grounds, for example, it would be unthinkable to require that the penalty be paid simply because one can sue for damages later. See *United States* v. *United Foods, Inc.*, 533 U.S. 405 (2001) (addressing First Amendment challenge to marketing order that imposed assessments on handlers of mushrooms, where challenge was raised as defense to enforcement action). There is no reason to treat the Takings Clause any differently.

It is unsurprising, then, that this Court has often reached the merits of Takings Clause defenses without noting any ripeness problem. See *Bennis* v. *Michigan*, 516 U.S. 442, 452-453 (1996) (takings claim raised as defense to asset forfeiture action); *FCC* v. *Fla. Power Corp.*, 480 U.S. 245 (1987) (takings claim addressed in response to FCC rate-setting order); *Kaiser Aetna* v. *United States*, 444 U.S. 164 (1979); (takings claim addressed in suit by federal government over public access to marina); *Goldblatt* v. *Town of Hempstead, N.Y.*, 369 U.S. 590, 594 (1962) (takings

defense raised in action to enjoin defendant from operating a sand and gravel pit without a permit). This Court's review is needed to confirm that the same ripeness rules that govern other constitutional claims govern claims for takings, particularly where those claims are asserted as a *defense* to imminent government action.

II. *Williamson County* Should Be Overruled Because Its Premises Have Become Untenable.

As we have explained, certiorari is warranted to confirm that *Williamson County* should not be cut loose from its original moorings and extended to takings of money. But this case also presents an opportunity to consider whether *Williamson County*'s ripeness rule should be overruled in its entirety.

As Chief Justice Rehnquist once observed, *Williamson County* has perverse consequences for claims against state and local governments. It forces litigants to bring their federal takings claims in state court, after which litigants end up being precluded from pursuing those claims in federal court. *San Remo Hotel, L.P.* v. *City & Cnty of S.F., Cal.*, 545 U.S. 323, 351 (2005) (Rehnquist, C.J., joined by Kennedy, Thomas, and O'Connor, J.J., concurring). As a result, "*Williamson County* all but guarantees that claimants will be unable to utilize the federal courts to enforce the Fifth Amendment's just compensation guarantee." *Ibid.* Despite having joined the majority in *Williamson County*, Chief Justice Rehnquist indicated that "further reflection and experience" have rendered that decision "suspect." *Id.* at 352.

More than suspect, reflection and experience have shown *Williamson County* worthy of abandonment. As explained below, the decision not only lacks sup-

port in the text, structure, history, and purpose of the Takings Clause; it also imposes significant practical burdens on property owners—burdens that confirm the unjust nature of the ripeness rule it laid down. See *Payne* v. *Tennessee*, 501 U.S. 808, 827 (1991) (explaining that precedents may be overruled when they "are unworkable or are badly reasoned").

A. The Text And History Of The Takings Clause Do Not Permit The Government To Defer Compensation Until After A Taking Occurs.

At its very core, *Williamson County*'s holding rests on a mistaken premise—that the Fifth Amendment does not require actual compensation at the time of a taking; instead, "all that is required" is a "process" by which an aggrieved property owner might (or might not) obtain compensation later on. 473 U.S. at 194. In other words, the government may take first and ask questions later. And the onus is on the property owner to avail herself of state or federal "process" in hopes of ultimately receiving something in return.

In assuming that no compensation is required at the time of a taking, *Williamson County* purported to rely on the "nature of the constitutional right" protected by the Takings Clause. But the text of the Takings Clause suggests nothing of the sort. See *San Remo Hotel*, 545 U.S. at 349 (Rehnquist, C.J., concurring) (noting that, although "*Williamson County* purported to interpret the Fifth Amendment," its interpretation is "not obvious"); *Wilkie* v. *Robbins*, 551 U.S. 537, 583 (2007) (Ginsburg, J. dissenting) ("Correlative to the right to be compensated for a taking is the right to refuse to submit to a taking where no compensation is in the offing.").

The Takings Clause provides: "[N]or shall private property be taken for public use, *without* just compensation." The most natural reading of this language is that compensation is a prerequisite that the government must satisfy when it effects a taking—not something to be made available later. Far from merely establishing a post-taking damages remedy requiring lengthy court proceedings, the text of the Takings Clause suggests no temporal separation between the taking and the payment of compensation. And it certainly does not compel the conclusion that compensation may always be paid at some indefinite later time.

This understanding of the Takings Clause, moreover, comports with how it was understood for a century after the Bill of Rights was enacted. As one early court explained: "as an original question, it seems clear that the proper interpretation of the Constitution requires that the owner should receive his just compensation *before* entry upon his property." *Md. & Wash. Ry. Co.* v. *Hiller*, 8 App. D.C. 289, 294 (C.A.D.C. 1896) (emphasis added); see also Robert Brauneis, *The First Constitutional Tort: The Remedial Revolution in Nineteenth-Century State Just Compensation Law*, 52 Vand. L. Rev. 57, 60 (1999) (concluding that "for most of the nineteenth century, just compensation clauses were generally understood not to create remedial duties, but to impose legislative disabilities").

In fact, that understanding dates as far back as Magna Carta, which provided that "[n]o constable or other royal official shall take corn or other movable goods from any man without *immediate payment*." Magna Carta, Cl. 28 (1215) (emphasis added).

B. There Is No Reason To Treat The Takings Clause Differently From The Due Process Clause.

Not only is belated compensation unsupported by the language of the Takings Clause; it is also discordant with this Court's treatment of analogous language in the Due Process Clause. Just as property may not be taken "without just compensation," it also may not be taken "without due process of law." Accord *Baker* v. *McCollan*, 443 U.S. 137, 145 (1979) ("The Fourteenth Amendment does not protect against all deprivations of liberty. It protects only against deprivations of liberty accomplished 'without due process of law.'"). Yet, unlike the Takings Clause, "the Court usually has held that the [Due Process Clause] requires some kind of a hearing *before* the State deprives a person of liberty or property." *Zinermon* v. *Burch*, 494 U.S. 113, 128 (1990) (citing cases).

Why treat due process as a prerequisite to government action while treating compensation as an afterthought? *Williamson County* sidestepped this question by analogizing to *Parratt* v. *Taylor*, 451 U.S. 527 (1981), a due process case in which the Court had held that a deprivation of property was justified by "the provision of meaningful postdeprivation process." 473 U.S. at 195. Since *Williamson County*, however, this Court has made clear that *Parratt* applies only to situations where the government is *unable* to provide pre-deprivation process. *Zinermon*, 494 U.S. at 132. "In situations where the State feasibly can provide a predeprivation hearing before taking property, it generally must do so regardless of the adequacy of a postdeprivation tort remedy to compensate for the

taking." *Ibid.* The same rule should apply to the Takings Clause.

C. Deferring Compensation Until After A Taking Imposes Significant Burdens On Property Owners.

Williamson County's final effort to justify belated compensation was to suggest that, unlike in due process cases, "the Court has [n]ever recognized any interest served by pretaking compensation that could not be equally well served by post-taking compensation." 473 U.S. at 195 n.14. Real-world experience in the years since *Williamson County*, however, strongly belies that suggestion. For several reasons, property owners suffer substantial burdens in their efforts to recover compensation. And for many property owners, justice delayed will be justice denied.

First, obtaining compensation can take a very long time. In one recent case, for example, a Tucker Act claim filed by two ranchers in 1991 took "almost twenty years of litigation," culminating in a recent decision that the claim was *still* not ripe because the ranchers had not exhausted all administrative remedies. *Estate of Hage* v. *United States*, 2012 WL 3043001, at *3-5 (Fed. Cir. July 26, 2012). Even if more litigation eventually results in compensation, however, it will be too late: Both ranchers have since died. See Sandra Chereb, *Wayne Hage, Nevada Rancher and Sagebrush Rebel, Dies*, The Associated Press (June 6, 2006).[5] A twenty-year delay may be atypical, but substantial delay in recovering compen-

---

[5] Available at: www.propertyrightsresearch.org/2006/articles06/wayne_hage.htm

sation is *not*. *E.g.*, *Bowles* v. *United States*, 31 Fed. Cl. 37, 52 (1994) (noting "long delay").

Second, it is often very costly for a property owner to litigate compensation. For example, when Minnesota took from David Luse five acres that he and his wife had owned for twenty years, he had to spend $100,000 in attorney and appraisal fees before eventually receiving $845,000 in compensation. Dan Browning, *MnDOT's Tactics Squeeze Landowners*, Minneapolis Star Tribune (Sept. 20, 2003).[6] Another Minnesotan had to spend over $50,000 to secure just compensation. *Ibid.*; see also *Holman* v. *City of Warrenton*, 242 F. Supp. 2d 791, 808 (D. Or. 2002) (describing inverse condemnation process as "time-consuming and expensive"). Making matters worse, such costs of litigation are often uncompensated. See Abraham Bell & Gideon Parchomovsky, *Taking Compensation Private*, 59 Stan. L. Rev. 871, 890 & n.108 (2007) (noting that only sixteen states have enacted statutes awarding full or partial reimbursement in eminent domain litigation).

Even if full compensation is eventually paid, it can be extremely burdensome for a cash-strapped property owner—particularly one who loses a home or business—to await that day. One small business owner who lost his shop in West Virginia, for example, "worried about being able to find a new property at the drop of a hat" because he did not have enough money to pay up-front a second rent, remodel a new shop, and cover the lost revenue from the 30 days his business would have to close for the move. Jillian Swords, *Eminent Domain Leaves Businesses Home-*

---

[6] Available at: www.startribune.com/local/11574556.html

less, The Appalachian (Feb. 12, 2008).[7] Similarly, an elderly couple in North Carolina was left homeless when their farm was taken to expand a landfill. Lynnette Taylor, *Eminent Domain Case Leaves Surry County Family Homeless*, WITN (Nov. 17, 2007).[8] They stayed on the farm, only to be ordered to pay rent on their own property to the state.

Such burdens are also likely to be felt by the most vulnerable, as eminent domain disproportionately targets "ethnic or racial minorities" and those who "have completed significantly less education, live on significantly less income, and live at or below the federal poverty line." Dick M. Carpenter II & John K. Ross, *Victimizing the Vulnerable* 2 (2007).[9] The costs, delays, and complications of seeking compensation are thus often imposed on those least equipped to bear them, and on those least able to await belated compensation.

Third, takings accompanied by no more than a vague prospect of future compensation are extremely demoralizing to property owners. Just as "predeprivation process may serve the purpose of making an individual feel that the government has dealt with him fairly," predeprivation compensation does the same. *Williamson County*, 473 U.S. at 195 n.14. As Professor Michelman famously observed, "demoralization costs" should not be neglected in the

---

[7] Available at: www.theappalachianonline.com/community/3251-eminent-domain-leaves-businesses-homeless

[8] Available at: www.witn.com/home/headlines/11533181.html

[9] Available at: www.ij.org/images/pdf_folder/other_pubs/Victimizing_the_Vulnerable.pdf

takings calculus. Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 Harv. L. Rev. 1165, 1214 (1967). And those costs are quite significant here.

For all of these reasons, it is no longer tenable to maintain that there is no "interest served by pretaking compensation that could not be equally well served by post-taking compensation." *Williamson County*, 473 U.S. at 195 n.14. It is critical that the Court confirm that the *Williamson County* ripeness rule does not apply to a "direct transfer of funds mandated by the Government," *Apfel*, 524 U.S. at 521—and in so doing, the Court should take this opportunity to consider whether *Williamson County* should be overruled outright.

CONCLUSION

Williamson County is unsupportable as a matter of constitutional text, structure, history, and purpose. Moreover, it is unworkable in practice and imposes unwarranted burdens on property owners, particularly those of limited means. The Court should therefore take this opportunity to overrule it. At a minimum, however, *Williamson County* should not be cut loose from its original rationale, which is limited to real property and certainly ought not apply where the government has imposed a fine.

Respectfully submitted.

WILLIAM P. FERRANTI
Winston & Strawn LLP
35 W. Wacker Drive
Chicago, IL 60601
(312) 558-5600

STEFFEN N. JOHNSON
Counsel of Record
JACOB R. LOSHIN
Winston & Strawn LLP
1700 K Street, N.W.
(202) 282-5000
sjohnson@winston.com

Counsel for Amici Curiae

ILYA SHAPIRO
Cato Institute
1000 Mass. Ave.
Washington, DC 20001
(202) 842-0200
ishapiro@cato.org

Counsel for Cato Institute

KAREN R. HARNED
ELIZABETH MILITO
NFIB Small Business Legal Center
1201 F St., NW, Ste. 200
Washington, DC 20004
(202) 406-4443
elizabeth.milito@nfib.org

Counsel for National Federation of Independent Business

JOHN C. EASTMAN
Center for Constitutional Jurisprudence
c/o Chapman University School of Law
One University Drive
Orange, CA 92886
(714) 628-2500
jeastman@chapman.edu

Counsel for Center for Constitutional Jurisprudence

MANUEL S. KLAUSNER
Law Offices of Manuel S. Klausner, P.C.
One Bunker Hill Bldg.
601 West Fifth Street
Los Angeles, CA 90071
(213) 617-0414
mklausner@klausnerinc.com

Counsel for Reason Foundation

AUGUST 2012

APPENDIX

APPENDIX A: LIST OF *AMICI*

The *Cato Institute* was established in 1977 as a nonpartisan public-policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences, publishes the annual *Cato Supreme Court Review*, and files amicus briefs, including in various cases concerning property rights. This case is of central concern to Cato because it implicates the safeguards the Constitution provides for the protection of property rights against wrongful takings.

The *National Federation of Independent Business* (NFIB) is the nation's leading small business association, representing members in Washington, D.C., and all 50 state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate and grow their businesses. NFIB represents about 350,000 member businesses nationwide, and its membership spans the spectrum of business operations, ranging from sole proprietor enterprises to firms with hundreds of employees. While there is no standard definition of a "small business," the typical NFIB member employs 10 people and reports gross sales of about $500,000 a year. The NFIB membership is a reflection of American small business.

The *National Federation of Independent Business Small Business Legal Center* (NFIB Legal Center) is a nonprofit, public interest law firm established to

provide legal resources and be the voice for small businesses in the nation's courts on issues of public interest affecting small businesses. To fulfill its role as the voice for small business, the NFIB Legal Center frequently files amicus briefs in cases that will impact small businesses.

The *Center for Constitutional Jurisprudence* is the public interest law arm of the Claremont Institute, the mission of which is to restore the principles of the American Founding to their rightful and preeminent authority in our national life, including the proposition expressed in the Fifth Amendment that private property can be taken only for public use, and then only upon payment of just compensation. In addition to providing counsel for parties at all levels of state and federal courts, the Center has participated as *amicus curiae* before this Court in several cases of constitutional significance, including *Kelo* v. *City of New London, Connecticut*, 545 U.S. 469 (2005), and *Rapanos* v. *United States*, 547 U.S. 715 (2006).

The *Reason Foundation* is a national, nonpartisan, and nonprofit public policy think tank, founded in 1978. Reason's mission is to advance a free society by developing, applying, and promoting libertarian principles and policies—including free markets, individual liberty, and the rule of law. Reason supports dynamic market-based public policies that allow and encourage individuals and voluntary institutions to flourish. Reason advances its mission by publishing *Reason* magazine, as well as commentary on its websites, *www.reason.com* and *www.reason.tv*, and by issuing policy research reports. To further Reason's commitment to "Free Minds and Free Markets," Reason selectively participates as amicus curiae in cases raising significant constitutional issues.

JOINT APPENDIX

RECORD
AND
BRIEFS

Supreme Court, U.S.
FILED
JAN 9 - 2013
OFFICE OF THE CLERK

No. 12-123

In the Supreme Court of the United States

MARVIN D. HORNE, ET AL.,

Petitioners,

v.

UNITED STATES DEPARTMENT OF AGRICULTURE,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOINT APPENDIX

DONALD B. VERRILLI, JR.
Counsel of Record
Solicitor General
Department of Justice
950 Pennsylvania Ave., NW
Washington, DC 20530
(202) 514-2217
SupremeCtBriefs@usdoj.gov
Counsel for Respondent

MICHAEL W. MCCONNELL
Counsel of Record
Kirkland & Ellis LLP
655 Fifteenth Street, NW
Washington, DC 20005
(202) 879-5000
michael.mcconnell@kirkland.com
Counsel for Petitioners

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

Petition for Writ of Certiorari Filed July 25, 2012
Certiorari Granted November 20, 2012

Library of
Law Library

TABLE OF CONTENTS

Relevant Docket Entries,
United States Department of Agriculture,
AMAA Docket No. 04-0002 1

Relevant Docket Entries,
U.S. District Court, E.D. Cal.
Docket No. 1:08-cv-01549-LJO-SMS 11

Relevant Docket Entries,
U.S. Court of Appeals, Ninth Circuit
Docket No. 10-15270 16

USDA, Administrative Law Judge's
Decision and Order (Dec. 8, 2006) 24

USDA, Judicial Officer's Decision and
Order (Apr. 11, 2008) 50

USDA, Judicial Officer's Order Granting
Petition to Reconsider (Sept. 18, 2008) 95

Order, U.S. District Court for the
Eastern District of California
(Dec. 11, 2009) 119

Judgment, U.S. District Court for the
Eastern District of California
(Dec. 11, 2009) 185

Opinion, U.S. Court of Appeals
for the Ninth Circuit
(July 25, 2011) 186

Petition for Panel Rehearing or
Rehearing *En Banc* (Sept. 9, 2011) 215

Opposition to Petition for Panel Rehearing
and Rehearing *En Banc* (Nov. 21, 2011) 234

Reply Brief in Support of Petition
for Panel Rehearing or Rehearing *En Banc*
(Dec. 30, 2011) 253

Surreply in Opposition to Petition for
Panel Rehearing and Rehearing *En Banc*
(Feb. 16, 2012) 273

Order, U.S. Court of Appeals
for the Ninth Circuit
(Feb. 29, 2012) 285

Order, U.S. Court of Appeals
for the Ninth Circuit
(Mar. 12, 2012) 287

Amended Opinion, U.S. Court of Appeals
for the Ninth Circuit
(Mar. 12, 2012) 289

Statutory and Regulatory Provisions
28 U.S.C. § 1491 312
7 U.S.C. § 608c 315
7 C.F.R. § 989.11 354
7 C.F.R. § 989.15 354

UNITED STATES OF AMERICA
DEPARTMENT OF AGRICULTURE

I, Edward T. Schafer, Secretary of the United States Department of Agriculture, do hereby certify that the annexed copy, or each of the specified number of annexed copies, is a true, correct and compared copy of a document in my official custody as hereinafter described:

In re: Marvin D. Horne and Laura R. Horne, d/b/a Raisin Valley Farms, et al.

Respondents

AMAA Docket No. 04-0002

Date	No.	PROCEEDINGS
04/01/2004	1	Complaint filed April 1, 2004 by AJ Yates, Administrator of Agricultural Marketing Service
		* * * *
04/14/2004	3	Respondents' Answer and Response to the Complaint filed April 14, 2004, by Marvin D. Horne and Laura Horne, Respondents
		* * * *
04/19/2004	5	Respondents' Motion to Dismiss filed April 19, 2004, by Marvin D. Horne and

Date	No.	PROCEEDINGS
		Laura Horne, Respondents
04/22/2004	6	Complainant's Opposition to Respondents' Motion to Dismiss filed April 22, 2004, by Frank Martin, Attorney for Complainant
		* * * *
10/07/2004	18	Motion for Discovery and Summary Judgment with Prejudice in favor of Respondents (FAX) filed October 7, 2004, by Marvin Horne and Laura Horne, Respondents
		* * * *
10/13/2004	20	Complainant's Opposition to Respondents' Motion for Discovery and Summary Judgment filed October 13, 2004, by Frank Martin, Attorney for Complainant
		* * * *
10/25/2004	24	Order Denying Discovery and Motion for Summary Judgment filed October 25, 2004, by Victor W. Palmer, Administrative Law Judge

Date	No.	PROCEEDINGS
		* * * *
10/25/2004	27	Amended Complaint filed October 25, 2004, by Frank Martin, Attorney for Complainant
		* * * *
11/15/2004	32	Answer to Amended Complaint filed November 15, 2004, by Marvin Horne and Laura Horne, Respondents
		* * * *
01/21/2005	40	Amended Answer filed January 21, 2005, by David Domina, Attorney for Respondents
		* * * *
01/31/2005	46	Respondents' Second Amended Answer (FAX) filed January 31, 2005, by David Domina, Attorney for Respondents
		* * * *
03/04/2005	147	Transcript of Hearing held February 8, 2005, in Fresno, California Before: Honorable Victor W. Palmer,

Date	No.	PROCEEDINGS
		Administrative Law Judge, filed March 4, 2005. Transcripts pages: 1 through 7
03/04/2005	148	Transcript of Hearing held February 9, 2005, in Fresno, California Before: Honorable Victor W. Palmer, Administrative Law Judge, filed March 4, 2005. Transcripts pages: 8 through 402
03/04/2005	149	Transcript of Hearing held February 10, 2005, in Fresno, California Before: Honorable Victor W. Palmer, Administrative Law Judge, filed March 4, 2005. Transcripts pages: 403 through 863
03/04/2005	150	Transcript of Hearing held February 11, 2005, in Fresno, California Before: Honorable Victor W. Palmer, Administrative Law Judge, filed March 4, 2005. Transcripts pages: 864 through 1017

* * * *

Date	No.	PROCEEDINGS
04/14/2005	50	Complainant's Proposed Findings of Fact, Conclusions of Law, Order, and Brief in Support Thereof filed April 14, 2005, by Frank Martin, Attorney for Complainant
		* * * *
05/17/2005	52	Respondent's Proposed Findings of Fact, Conclusions of Law, Order, and Brief in Support filed May 17, 2005, by David Domina, Attorney for Respondents
		* * * *
06/17/2005	55	Complainant's Reply Brief filed June 17, 2005, by Frank Martin, Attorney for Complainant
		* * * *
08/03/2005	57	Order Authorizing Amendment of Complaint to Conform to the Evidence filed August 3, 2005, by Victor W. Palmer, Administrative Law Judge
08/10/2005	58	Second Amended Complaint filed August 10, 2005, by Lloyd

Date	No.	PROCEEDINGS
		C. Day, Administrator for Agricultural Marketing Service
		* * * *
08/30/2005	63	Answer to Second Amended Complaint (FAX) filed August 30, 2005, by Don Durbahn, General Partner of Lassen Vineyards
		* * * *
08/30/2005	65	Answer to Second Amended Complaint (FAX) filed August 30, 2005, by Don Durbahn
		* * * *
08/31/2005	61	Answer to Second Amended Complaint (FAX) filed August 31, 2005, by Don Durbahn, Executor of Estate of Rena Durbahn
		* * * *
08/31/2005	67	Respondents Marvin Horne and Laura Horne d/b/a Raisin Valley Farms' Answer to Second Amended Complaint (FAX) filed August 31, 2005, by David Domina, Attorney for

Date	No.	PROCEEDINGS
		Respondents
		* * * *
09/06/2005	69	Answer to Second Amended Complaint filed September 6, 2005, by Don Durbahn, Executor of Estate of Rena Durbahn
09/06/2005	70	Answer to Second Amended Complaint filed September 6, 2005, by Don Durbahn, General Partner of Lassen Vineyards
09/06/2005	71	Answer to Second Amended Complaint filed September 6, 2005, by Don Durbahn
09/07/2005	72	Respondents Marvin Horne and Laura Horne d/b/a Raisin Valley Farms' Answer to Second Amended Complaint filed September 7, 2005, by David Domina, Attorney for Respondents
		* * * *
05/23/2006	151	Transcript of Hearing held May 23, 2006, in Fresno, California Before: Honorable Victor W. Palmer,

Date	No.	PROCEEDINGS
		Administrative Law Judge, filed March 4, 2005. Transcripts pages: 1 through 262
		* * * *
12/08/2006	120	Decision and Order filed December 8, 2006, by Victor Palmer, Administrative Law Judge
		* * * *
01/04/2007	122	Respondent's Opening Brief On Appeal to Judicial Officer, USDA filed January 4, 2007, by David Domina, Attorney for Respondents
01/04/2007	123	Respondent's Notice of Appeal, Request for Oral Argument, and Appeal Petition to USDA Judicial Officer filed January 4, 2007, by David Domina, Attorney for Respondents
		* * * *
02/15/2007	127	Complainant's Brief in Opposition to Respondents' Appeal of the ALJ's decision and Order filed February 15, 2007, by Frank Martin,

Date	No.	PROCEEDINGS Attorney for Respondents
		* * * *
03/27/2007	129	Respondent's Reply Brief on Appeal to Judicial Officer, USDA filed March 27, 2007, by David Domina, Attorney for Respondents
		* * * *
04/11/2008	132	Decision and Order filed April 11, 2008, by William G. Jenson, Judicial Officer
		* * * *
05/12/2008	137	Complainant's Petition to Reconsider the Decision and Order of the Judicial Officer filed May 12, 2008, by Frank Martin, Attorney for Complainants
		* * * *
06/03/2008	139	Respondents' Opposition to Plaintiff's Petition to Reconsider filed June 3, 2008, by David Domina, Attorney for Respondents
		* * * *

Date	No.	PROCEEDINGS
06/19/2008	141	Order Seeking Clarification filed June 19, 2008, by William G. Jenson, Judicial Officer
07/11/2008	142	Administrator's Response to the Judicial Officer's Order Seeking Clarification filed July 11, 2008, by Frank Martin, Attorney for Complainant
08/04/2008	143	Respondents' Submission Opposing the Administrator's Response to an Order Seeking Clarification filed August 4, 2008, by David Domina, Attorney for Respondents
		* * * *
09/18/2008	145	Order Granting Petition to Reconsider filed September 18, 2008, by William G. Jenson, Judicial Officer

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

Live System (Fresno)

CIVIL DOCKET FOR CASE #: 1:08-cv-01549-LJO-SMS

Horne, et al v. United States Department of Agriculture	Date Filed: 10/14/2008
Assigned to: District Judge Lawrence J. O'Neill	Date Terminated: 12/11/2009
Referred to: Magistrate Judge Sandra M. Snyder	Jury Demand: None
Case in other court: 9th Circuit Court, 10-15270	Nature of Suit: 891 Agriculture Acts
Cause: 18:4208(B) Agency Action Review	Jurisdiction: U.S. Government Defendant

Date	No.	PROCEEDINGS
10/14/2008	2	COMPLAINT *FOR DECLARATORY RELIEF; REVIEW OF AGENCY ACTION* against United States Department of Agriculture by Marvin D. Horne, Laura R. Horne, Raisin Valley Farms, Raisin Valley Farms Marketing Association, Don Durbahn, Estate of Rena Durbahn, Lassen Vineyards. Attorney Leighton, Brian C added. (Attachments: # 1 Exhibit JO's Decision and Order of

Date	No.	PROCEEDINGS
		91808)(Leighton, Brian) (Entered: 10/14/2008)
		* * * *
12/18/2008	8	*DEFENDANT UNITED STATES DEPARTMENT OF AGRICULTURE'S ANSWER* to COMPLAINT *FOR DECLARATORY RELIEF; REVIEW OF AGENCY ACTION/BILL OF EQUITY; REVIEW OF USDA'S DECISION UNDER THE AGRICULTURAL MARKETING AGREEMENT ACT* by United States Department of Agriculture. Attorney Hall, Benjamin E. added. (Hall, Benjamin) (Entered: 12/18/2008)
		* * * *
08/28/2009	24	MOTION for SUMMARY JUDGMENT by Marvin D. Horne, Laura R. Horne, Raisin Valley Farms Marketing Association, Don Durbahn, Estate of Rena Durbahn, Lassen Vineyards, LLC. Motion Hearing set for 12/4/2009 at 01:30 PM in Courtroom 4 (LJO) before District Judge Lawrence

Date	No.	PROCEEDINGS
		J. O'Neill. (Leighton, Brian) (Entered: 08/28/2009)
08/28/2009	25	MEMORANDUM by Marvin D. Horne, Laura R. Horne, Raisin Valley Farms Marketing Association, Don Durbahn, Estate of Rena Durbahn, Lassen Vineyards, LLC in SUPPORT of 24 MOTION for SUMMARY JUDGMENT. (Leighton, Brian) (Entered: 08/28/2009)
10/06/2009	26	MOTION for SUMMARY JUDGMENT by United States Department of Agriculture. Motion Hearing set for 12/4/2009 at 01:30 PM in Courtroom 4 (LJO) before District Judge Lawrence J. O'Neill. (Attachments: # 1 Memorandum of Points and Authorities in Support of USDA's Cross-Motion for Summary Judgment and in Opposition to Plaintiffs' Motion for Summary Judgment, # 2 Statement of Undisputed Facts in Support of Cross-Motion for Summary Judgment, # 3 Response to Plaintiffs' Separate Statement of Undisputed Facts in Support of Motion for

Date	No.	PROCEEDINGS
		Summary Judgment) (Hall, Benjamin) (Entered: 10/06/2009)
		* * * *
11/03/2009	29	OPPOSITION by Marvin D. Horne, Laura R. Horne, Raisin Valley Farms Marketing Association, Don Durbahn, Estate of Rena Durbahn, Lassen Vineyards, LLC to 26 MOTION for SUMMARY JUDGMENT, 24 MOTION for SUMMARY JUDGMENT. (Leighton, Brian) (Entered: 11/03/2009)
11/03/2009	30	RESPONSE by Marvin D. Horne, Laura R. Horne, Raisin Valley Farms Marketing Association, Don Durbahn, Estate of Rena Durbahn, Lassen Vineyards, LLC to 26 MOTION for SUMMARY JUDGMENT. (Leighton, Brian) (Entered: 11/03/2009)
11/19/2009	31	REPLY by United States Department of Agriculture to RESPONSE to 26 MOTION for SUMMARY JUDGMENT. (Hall, Benjamin) (Entered: 11/19/2009)

Date	No.	PROCEEDINGS
		* * * *
12/11/2009	34	ORDER DENYING 24 Motion for Summary Judgment; GRANTING 26 Motion for Summary Judgment, signed by District Judge Lawrence J. O'Neill on 12/09/2009. CASE CLOSED (Martin, S) (Entered: 12/11/2009)
12/11/2009	35	JUDGMENT dated *12/11/2009* in favor of Defendant against Plaintiff pursuant to order (Martin, S) (Entered: 12/11/2009)
02/04/2010	36	NOTICE of APPEAL by Marvin D. Horne, Laura R. Horne, Raisin Valley Farms Marketing Association, Don Durbahn, Estate of Rena Durbahn, Lassen Vineyards, LLC. (Attachments: # 1 Civil Appeals Docketing Statement and Service List/Representative Statement, # 2 Judgment, # 3 Ordering Denying Motion for Summary Judgment)(Leighton, Brian) (Entered: 02/04/2010)

General Docket

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Court of Appeals Docket #: 10-15270
Nature of Suit: 2891 Agricultural Acts
Marvin Horne, et al v. AGRI
Appeal From: U.S. District Court for Eastern California, Fresno
Fee Status: Paid

Docketed: 02/05/2010
Termed: 07/25/2011

Case Type Information:
1) civil
2) united states
3) null

Originating Court Information:
District: 0972-1: 1:08-cv-01549-LJO-SMS
Trial Judge: Lawrence J. O'Neill, District Judge
Date Filed: 10/14/2008

Date Order/Judgment:	Date Order/Judgment EOD:	Date NOA Filed:	Date Rec'd COA:
12/11/2009	12/11/2009	02/04/2010	02/04/2010

Date	No.	PROCEEDINGS
06/07/2010	7	Submitted (ECF) Opening brief for review. Submitted by Appellants Don Durbahn, Estate of Rena Durbahn, Laura Horne, Marvin Horne, Lassen Vineyards, LLC and Raisin Valley Farms Marketing Association. Date of service: 06/07/2010. [7362513] (BCL)

* * * *

Date	No.	PROCEEDINGS
07/21/2010	12	Submitted (ECF) Answering brief for review. Submitted by Appellee AGRI. Date of service: 07/21/2010. [7412395]--[COURT UPDATE: Attached corrected brief (footnotes). 07/22/2010 by RY] (BEH)
		* * * *
09/03/2010	18	Submitted (ECF) Reply brief for review. Submitted by Appellants Don Durbahn, Estate of Rena Durbahn, Laura Horne, Marvin Horne, Lassen Vineyards, LLC and Raisin Valley Farms Marketing Association. Date of service: 09/03/2010. [7463717] (BCL)
		* * * *
04/14/2011	24	ARGUED AND SUBMITTED TO STEPHEN R. REINHARDT, MICHAEL DALY HAWKINS and RONALD M. GOULD. [7717243] (BG)
07/25/2011	25	FILED OPINION (STEPHEN R. REINHARDT, MICHAEL DALY HAWKINS and

Date	No.	PROCEEDINGS
		RONALD M. GOULD) AFFIRMED. Judge: MDH Authoring, FILED AND ENTERED JUDGMENT. [7831175] (RP)
		* * * *
09/09/2011	30	Filed (ECF) Appellants Don Durbahn, Estate of Rena Durbahn, Laura Horne, Marvin Horne, Lassen Vineyards, LLC and Raisin Valley Farms Marketing Association petition for panel rehearing and petition for rehearing en banc (from 07/25/2011 opinion). Date of service: 09/08/2011. [7887818] (AB)
		* * * *
11/21/2011	39	Filed (ECF) Appellee AGRI response to Order to set response by any party to anything, Order, Combo PFR Panel and En Banc (ECF Filing), Combo PFR Panel and En Banc (ECF Filing) for panel and en banc rehearing, for panel and en banc rehearing (statistical entry). Date of service: 11/21/2011. [7974105].

Date	No.	PROCEEDINGS (KBC)

* * * *

12/30/2011	43	Filed (ECF) Appellants Don Durbahn, Estate of Rena Durbahn, Laura Horne, Marvin Horne, Lassen Vineyards, LLC and Raisin Valley Farms Marketing Association reply to set response by any party to anything, for panel and en banc rehearing, for panel and en banc rehearing (statistical entry). Date of service: 12/30/2011. [8016398]. (AB)
01/05/2012	44	Filed order (STEPHEN R. REINHARDT, MICHAEL DALY HAWKINS and RONALD M. GOULD) Defendant-Appellee shall file a surreply to Plaintiffs-Appellants' Reply Brief in Support of Petition for Panel Rehearing or Rehearing En Banc, filed with this court on December 30, 2011. The surreply shall specifically address, but is not limited to: (1) the relevance of Lion

Date	No.	PROCEEDINGS
		Raisins, Inc. v. United States, 416 F.3d 1356 (Fed. Cir. 2005), to the issues in this case; and (2) whether the Government, by claiming that the present case lies within the scope of Tucker Act jurisdiction, contradicts its previous position that Lion Raisins lies outside that scope. The surreply shall not exceed ten (10) pages, or 2800 words, and shall be filed within twenty-one (21) days of the filed date of this Order. [8020960] (SM)
		* * * *
02/16/2012	47	Filed (ECF) Appellee AGRI reply to set response by any party to anything. Date of service: 02/16/2012. [8071323]. (KBC)
02/28/2012	48	Filed (ECF) Appellants Don Durbahn, Estate of Rena Durbahn, Laura Horne, Marvin Horne, Lassen Vineyards, LLC and Raisin Valley Farms Marketing Association Motion to file supplemental brief for petition for rehearing. Date of service: 02/28/2012. [8082388] (AB)

Date	No.	PROCEEDINGS
02/29/2012	49	Filed order (STEPHEN R. REINHARDT, MICHAEL DALY HAWKINS and RONALD M. GOULD) Plaintiffs-Appellants' Motion for Leave to File Supplemental Brief in Support of Petition for Panel Rehearing or Rehearing En Banc is DENIED. [8085426] (SM)
		* * * *
03/12/2012	52	Filed order (STEPHEN R. REINHARDT, MICHAEL DALY HAWKINS and RONALD M. GOULD) The opinion filed July 25, 2011, slip op. 9453, and appearing at ___ F.3d ___, No. 10-15270, 2011 WL 2988902 (9th Cir. 2011), is hereby amended per the Amended Opinion filed concurrently with this Order. The panel has voted to deny the petition for panel rehearing. Judges Reinhardt and Gould have voted to deny the petition for panel rehearing en banc, and Judge Hawkins has so recommended. The full court was advised of the petition for rehearing en banc and no judge has requested a

Date	No.	PROCEEDINGS
		vote on whether to rehear the matter en banc. Fed. R. App. P. 35. The petition for rehearing and the petition for rehearing en banc are DENIED. No further petitions for rehearing or rehearing en banc will be accepted for filing. [8098690] (RP)
03/12/2012	53	Filed amended opinion (STEPHEN R. REINHARDT, MICHAEL DALY HAWKINS and RONALD M. GOULD) [8098698] (RP)
03/20/2012	54	MANDATE ISSUED. (SR, MDH and RMG) [8111035] (LC)
06/04/2012	55	Received letter from the Supreme Court dated 06/01/2012. The application for an ext of time within which to file a petition for a writ of cert has been presented to Justice Kennedy, who on 6/1/12 extended the time to and including 7/25/12. Application No: 11A1125. [8206315] (RR)
08/01/2012	56	Received notice from the Supreme Court: petition for certiorari filed on 07/25/2012.

Date	No.	PROCEEDINGS
		Supreme Court Number 12-123. [8271870] (RR)
11/23/2012	57	Received notice from the Supreme Court. Petition for certiorari GRANTED on 11/20/2012. Supreme Court Number 12-123. [8412647] (RR)

UNITED STATES DEPARTMENT OF AGRICULTURE

BEFORE THE SECRETARY OF AGRICULTURE

In re:	)	AMAA
	)	Docket No.
Marvin D. Horne and	)	04-0002
Laura R. Horne, d/b/a	)	
Raisin Valley Farms, a partnership	)	
and d/b/a Raisin Valley	)	
Farms Marketing Association,	)	
also known as	)	
Raisin Valley Marketing, an	)	
unincorporated association	)	
	)	
And	)	
	)	
Marvin D. Horne,	)	
Laura R. Horne,	)	
Don Durbahn, and	)	
The Estate of Rena Durbahn, d/b/a	)	
Lassen Vineyards, a partnership,	)	
	)	
Respondents	)	

Decision and Order

This is a disciplinary proceeding under the Agricultural Marketing Agreement Act of 1937, (AMAA), as amended, 7 U.S.C. § 601 *et seq.* It was instituted by the United States Department of Agriculture's Administrator of the Agricultural

Marketing Service (AMS) who alleged that respondents did not comply with the provisions of the federal marketing order and the implementing regulation that applied for crop years 2002-2003 and 2003-2004 to first handlers of raisins produced from grapes grown in California (7 C.F.R. §§ 989.1-989.95 (Raisin Order), and 7 C.F.R. § 989.166 (Reserve tonnage regulation)). Under the Raisin Order and the Reserve tonnage regulation, first handlers are required to: (1) obtain inspections of raisins acquired or received (7 C.F.R. § 989.58(d)); (2) hold acquired raisins designated as reserve tonnage for the account of the Raisin Administrative Committee (RAC) (7 C.F.R. § 66 and 7 C.F.R. § 989.166); (3) file accurate reports with the RAC (7 C.F.R. § 73); (4) allow access to their records to verify their accuracy (7 C.F.R. § 989.77); and (5) pay assessments to the RAC (7 C.F.R. § 989.80). Respondents dispute that they are handlers in that they never obtained any raisins through purchase or transfer of ownership to any of the business entities that they operate and argue, therefore, they did not *acquire* raisins within the meaning of the Raisin Order. Respondents further argue that they are not subject to the requirements of the Raisin Order because they are farmers/producers who have acted in good faith to advance the stated policy of the Farmer-to-Consumer Direct Marketing Act of 1976, 7 U.S.C. §§ 3001-3006.

I held oral hearings in Fresno, California at which transcribed testimony was taken and exhibits were received (February 9-11, 2005 (Tr. I); May 23, 2006 (Tr. II)). AMS was represented at the first hearing by Frank Martin, Jr., Esq. who was joined at the second hearing by Babak A. Rastgoufard, Esq. Both

are attorneys with the Office of the General Counsel, United States Department of Agriculture. Respondents were represented by David Domina, Esq. and Michael Stumo, Esq. Complainant and respondents simultaneously filed their second post-hearing proposed findings, conclusions and supporting briefs on November 1, 2006.

Upon consideration of the record evidence, review of the provisions of the controlling Raisin Order, regulations and applicable and cited statutes, as well as the arguments of the parties, I have found and concluded that respondents Marvin D. Horne, Laura R. Horne, Don Durbahn and Reba Durbahn, now deceased, acting together as partners doing business as Lassen Vineyards, at all times material herein, acted as a first handler of raisins subject to the inspection, assessment, reporting, verification and reserve requirements of the Raisin Order and the Reserve tonnage regulation. I further find that these respondents violated the AMAA and the Raisin Order by failing to obtain inspections of acquired incoming raisins; failing to hold requisite tonnages of raisins in reserve; failing to file accurate reports; failing to allow access to their records; and failing to pay requisite assessments. I have concluded that the Farmer-to-Consumer Direct Marketing Act of 1976 has not exempted farmers/producers who act as handlers from being subject to regulation by federal marketing orders. I have further concluded that the violations by Marvin D. Horne, Laura R. Horne and Don Durbahn, on behalf of and doing business as Lassen Vineyards, require the entry of an order directing them to pay the RAC assessments they have failed to pay, and to pay the RAC the dollar equivalent of the raisins they failed to hold in

reserve. Moreover, I have concluded that their violations were deliberate and were designed to obtain an unfair competitive advantage over other California raisin handlers who were in compliance with the Raisin Order, and a civil penalty should therefore be assessed against them (excluding Rena Durbahn, now deceased) pursuant to 7 U.S.C. § 608c(14)(B), in the amount of $731,500.

Findings of Fact

1. Marvin D. Horne is a farmer who has farmed since 1969, growing Thompson seedless grapes for raisins. He does business with his wife Laura R. Horne as "Raisin Valley Farms" which is a registered trademark for their grape growing and raisin producing activities that are the largest in the California valley where most of the world's raisins are produced (Tr. I, at 868-869). Marvin D. Horne and Laura R. Horne also do business as Raisin Valley Farms Marketing Association (also known as Raisin Valley Marketing). Both Raisin Valley Farms and Raisin Valley Farms Marketing Association have the same business mailing address: 3678 North Modoc, Kerman, California 93630 (Tr. I, at 873).

2. During the 2002-2003 and 2003-2004 crop years, Marvin D. Horne and Laura R. Horne also operated a general partnership with Laura's father, Don Durbahn, and Laura's mother, Rena Durbahn (now deceased). This partnership did business and continues to do business as Lassen Vineyards at 2267 North Lassen, Kerman, California 93630. Prior to 2002, Lassen Vineyards was exclusively a farming partnership that produced Thompson seedless grapes made into raisins (Tr. I, at 870). In 2001, the

partnership ordered packing plant equipment that it commenced to use in 2002 (Tr. I, at 871-873).

3. Marvin D, Horne was a member or alternate member of the RAC for six years (Tr. I, at 175). As early as 1998, Marvin D. Horne and Laura R. Horne indicated to the RAC their interest in acting as a handler of California raisins under the Raisin Order (CX 94). In crop years 2001-2002, 2002-2003, and 2003-2004, Mr. and Mrs. Horne's partnership, Raisin Valley Farms, filed notifications with the RAC of intentions to handle raisins as a packer under the Raisin Order (CX-98, CX-100 and CX-102).

4. Mr. Horne has both met and corresponded with representatives of the United States Department of Agriculture who have advised him concerning his responsibilities as a handler under the Raisin Order (CX-94, RX-100-103, RX 113, Tr. I, at 169-171).

5. On March 15, 2001, Marvin D. Horne and Laura R. Horne, acting as Raisin Valley Farms, through their then attorney, wrote to the Secretary of Agriculture and asked whether the obligations of the federal raisin marketing order regarding volume regulation, quality control, payment of assessments to the Raisin Administrative Committee and reporting requirements would apply if Raisin Valley Farms had its raisins "custom packed" by the Del Rey Packing Company, a packer that would not take title to Raisin Valley Farms' raisins. On April 23, 2001, the Deputy Administrator, Fruit and Vegetable Programs, United States Department of Agriculture, replied on behalf of the Secretary (RX 98 (Appendix A); and Tr. II, at 957-960). The Deputy Administrator explained that under such circumstances, Raisin Valley Farms would be neither

a packer nor a handler, but that Del Rey would be both. This type of arrangement, in which the grower retains title and has his raisins packed for a fee is, the Deputy Administrator explained, comparable to "toll packing", a form of raisin acquisition by a handler that was recognized as such by the promulgation record underlying the Raisin Marketing Order. He further explained that under section 989.17 of the Raisin Order, 7 C.F.R. § 989.17, once an entity has or obtains physical possession of raisins at a packing or processing plant, it has "acquired" raisins within the meaning of the section, and thus Del Rey would:

> . . . be required to meet the order's obligations regarding volume regulation, quality control, payment of assessments to the Raisin Administrative Committee (RAC), and reporting requirements.

(RX 98 (Appendix A), at 1).

The Deputy Administrator enclosed portions of the 1949 Recommended Decision and hearing testimony relevant to the question that showed it had been expressly considered and discussed in the hearing record and in the Secretary's stated rationale for promulgating the Raisin Order. (These enclosures are part of RX 98, attached to this Decision and Order as Appendix A).

6. On April 23, 2002, Mr. and Mrs. Horne notified the Secretary of Agriculture that they were registering as a handler under the Raisin Order under protest, but agreed to comply with its volume control (reserve) provisions (CX-101).

7. Marvin D. Horne was also specifically advised, on May 20, 2002, by the Administrator of Marketing and Regulatory Programs, AMS, in response to an e-mail and a letter Mr. Horne had sent to the Secretary of Agriculture, that if he packed and handled his own raisins:

> Such activities would make you a handler under the order. As a handler, you would be required to meet all of the order's regulations regarding volume control, quality control (incoming and outgoing inspection), assessments, and reporting to the RAC.
>
> (RX 101, attached to this Decision and Order as Appendix B).

8. The Departmental interpretations of the terms of the Raisin Order that Marvin D. Horne requested and received were expressly disregarded. Though he did not have Del Rey custom pack his raisins, Mr. Horne elected to set up a family-owned toll packing operation at Lassen Vineyards and pack raisins for his family, and for growers for a fee (Tr. I, at 977). Contrary to the interpretive advice Marvin D. Horne had received from USDA, Lassen Vineyards did not pay any assessments, did not have any incoming inspections performed, did not file any reports, and did not hold any raisins in reserve in respect to any of the raisins Lassen Vineyards received from and packed for growers during the 2002-2003 and 2003-2004 crop years (Tr. I, at 965-973).

9. Lassen Vineyards, a general partnership operated by Marvin D. Horne, together with his partners, Laura R. Horne, Don Durbahn, and the

late Rena Durbahn, owned land at 2267 N. Lassen, Kerman, California 93630, where they owned and operated equipment and a raisin packing plant that they used, in the crop years 2002-2003 and 2003-2004, to stem, sort, clean, grade and package California raisins for themselves and, for a fee, for others (Tr. II, at 25-27, and 962). The only difference Mr. Horne could state between the way packing was conducted at Lassen Vineyards and by a toll packer charging a fee for sorting, cleaning and packing raisins in boxes was that the packed product could leave Lassen Vineyards without the farmer being required to pay fees up front (Tr. I, at 979).

10. During crop years 2002-2003 and 2003-2004, Lassen Vineyards charged producers a 12 cent per pound fee to pack raisins and five dollars for the use of each pallet upon which the boxed raisins were stacked (Tr. II, at 28 and 44). The cost for labor and packaging materials was included in the fee charged (Tr. II, at 30-31, 44, and 48). Some raisin producers were given discounts from these fees for services they performed or the volumes of raisins they had packed at the plant (Tr. II, at 39-43). The packing activities at Lassen Vineyards were supervised by Don Durbahn and by Marvin A. Horne, Mr. and Mrs. Marvin D. Horne's son (Tr. I, at 879-880). The workers who performed the packing activities at Lassen Vineyards were "leased employees" who were leased by Laura R. Horne and Rena Durbahn for Lassen Vineyards (Tr. I, at 933-934). All of the raisins packed by Lassen Vineyards in crop years 2002-2003 and 2003-2004, were packaged in boxes stamped with the handler number 94-101 that had been assigned to Marvin D. Horne and Laura R. Horne (Tr. I, at 964-965).

11. During crop years 2002-2003 and 2003-2004, Mr. and Mrs. Horne also conducted business as a not-for-profit unincorporated grower association named Raisin Valley Farms Marketing Association (also known as Raisin Valley Marketing). It was formed by Mr. and Mrs. Horne to "attract the market of buyers" and allow them and other raisin growers to market their raisins together under the Hornes' protected trade name "Raisin Valley Farms" (Tr. II, at 874-878). Sixty raisin growers were members of Raisin Valley Farms Marketing Association (Tr. II, at 55). Mr. Horne conducted the marketing activities of Raisin Valley Farms Marketing Association and sold the packaged raisins either himself or through brokers (Tr. II, at 38 and 49). When the sale of the packaged raisin was negotiated through a broker, the grower whose raisins were sold had the brokerage fee and the fee for the packing performed by Lassen Vineyards deducted from his payment check (Tr. II, at 50-51). When the sale was made without an outside broker, the grower's payment check was reduced by the fee for the packing services performed by Lassen Vineyards and by charges by the Association in the form of an accounting fee and for a fund to protect members from customers who fail to pay (Tr. II, at 51-52). Mr. Horne acknowledged that Lassen Vineyards benefited under these arrangements from the fees that it received from growers for "the rental of its equipment" (Tr. II, at 52).

12. When Mr. Horne or a broker found a buyer who desired raisins, Mr. Horne contacted one of Raisin Valley Farms Marketing Association's members on a rotational basis (that included the Raisin Valley Farms and the growing operations of

Lassen Vineyards) and asked them to bring their raisins to Lassen Vineyard's packing plant to be stemmed, sorted, cleaned, graded and packaged (Tr. II, at 55-57). After the raisins were packed, the buyer's trucks picked them up, left a bill of lading and when the buyer paid, the money went into an Association bank account, out of which the grower was paid less deductions for brokerage, if any, and the packing fees owed and paid to Lassen Vineyards (Tr. II, at 58-60).

13. On or about August 3, 2002, the respondents[1] submitted an inaccurate RAC-1 Form, Weekly Report of Standard Raisin Acquisitions, to the Raisin Administrative Committee (RAC). The respondents reported to the RAC that they did not acquire any California raisins during this time period. However, the record evidence shows that they acquired substantial amounts of California raisins during this time period (CX-1-2, CX-62, CX-82-87, CX-171-582, Tr. I, at 76-79 and 188-190).

14. From August 1, 2003 to November 30, 2003, the respondents submitted 13 inaccurate RAC-1 Forms Weekly Report of Standard Raisin Acquisitions, to the Raisin Administrative Committee (RAC). The respondents reported to the RAC that they did not acquire any California raisins during this time period. However, the record evidence shows that they acquired substantial

---

[1] As hereinafter used in the Decision and Order, "the respondents" refers to Marvin D. Horne; Laura R. Horne, Rena A. Durbahn and Don Durbahn acting on behalf of or doing business as Lassen Vineyards.

amounts of California raisins during this time period (CX-3-56, CX-63-75, CX-171-582, Tr. I, at 80-101).

15. From August 1, 2003 to November 30, 2003, the respondents submitted four inaccurate RAC-20 Forms, Monthly Reports of Free Tonnage Raisin Disposition, to the RAC. The respondents reported to the RAC that they did not ship or dispose of any California raisins during this time period. However, the record evidence shows that the respondents shipped substantial amounts of California raisins during this time period (CX-3-56, CX-76-79, CX-171-582, Tr. I, at 80-101).

16. During crop year 2002-2003, the respondents submitted an inaccurate RAC-50 Form, Inventory of Free Tonnage Standard Quality Raisins on Hand, to the RAC. The respondents reported to the RAC that they did not have any California raisin inventories during this time period. However, the record evidence shows that they had inventories of California raisins in that they were shipping substantial amounts of California raisins during this time period (CX-1-2, CX-80, CX-82-87, CX-171-582, Tr. I, at 76-79).

17. During crop year 2002-2003, the respondents submitted an inaccurate RAC-51 Form, Inventory of Off-Grade Raisins on Hand, to the RAC. The respondents reported to the RAC that they did not have any California raisin inventories during this time period. However, the record evidence shows that they had inventories of California raisins in that they were shipping substantial amounts of California raisins during this time period (CX-1-2, CX-81-87, Tr. I, at 76-79).

18. During crop year 2002-2003, the respondents failed to obtain incoming inspections on approximately 1,504,020 pounds of California raisins (CX-170-582, Tr. I, at 76-79).

19. During crop year 2003-2004, the respondents failed to obtain incoming inspection on fifty-two occasions for approximately 2,066,066 pounds of California raisins (CX-3-54, CX-56, Tr. I, at 90, 97-99 and 967-970).

20. During crop year 2002-2003, the respondents failed to hold in reserve for 294 days approximately 369.8 tons of California Natural Sun-dried Seedless raisins (CX-1, CX-2, CX-171-582, Tr. I, at 176-179, 965 and 973). During crop year 2002-2003, the free tonnage price (field price) for California raisins was $745.00 a ton (CX-583). The respondents failed to pay $275,501, to the RAC for California raisins they failed to hold in reserve for crop year 2002-2003 (CX-161, CX-171-582, Tr. I, at 972-973). The RAC issued two demand letters to the respondents to deliver reserve California raisins or to pay the dollar equivalent (RX-136-137).

21. During crop year 2003-2004, the respondents failed to hold in reserve for 298 days approximately 305.6 tons of California Natural Sun-Dried Seedless raisins (CX-3-54, CX-89, Tr. I, at 90 and 222-225). During crop year 2003-2004, the free tonnage price (field price) for California raisins was $810 a ton (CX-93, CX-583, Tr. I, at 225). The respondents failed to pay $247,536.00, to the RAC for California raisins they failed to hold in reserve for crop year 2003-2004 (CX-89, Tr. I, at 225 and 972-973). The RAC issued two demand letters to the respondents to

deliver reserve California raisins or to pay the dollar equivalent (RX-136-137).

22. During crop year 2002-2003, the respondents failed to pay assessments to the RAC of approximately $3,438.10 (CX-1-2, CX-171-582, Tr. I, at 76-79 and 217- 222).

23. During crop year 2003-2004, the respondents failed to pay assessments to the RAC of approximately $5,951.63 (CX-3-54, Tr. I, at 90, 222-226, and 972-973).

24. The respondents failed to allow access to their records to the U.S. Department of Agriculture, even after being served with two subpoenas for such access (CX-153, CX-154, CX-164, RX-106, Tr. I, at 422-432 and 946-947).

Conclusions of Law

1. The Secretary of Agriculture has jurisdiction in this matter.

2. On August 3, 2002, the respondents violated section 989.73(b) of the Raisin Order (7 C.F.R. § 989.73(b)), by submitting an inaccurate RAC-1 Form, Weekly Report of Standard Raisin Acquisitions, to the Raisin Administrative Committee (RAC).

3. From August 1, 2003 to November 30, 2003, the respondents violated section 989.73(b) of the Raisin Order (7 C.F.R. §989.73(b), by submitting thirteen inaccurate RAC-1 Forms, Weekly Reports of Standard Raisin Acquisitions, to the RAC.

4. From August 1, 2003 to November 30, 2003, the respondents violated section 989.73(d) of the Raisin

Order (7 C.F.R. §989.73(d)), by submitting four inaccurate RAC-20 Forms, Monthly Reports of Free Tonnage Raisin Disposition, to the RAC.

5. The respondents violated section 989.73(a) of the Raisin Order (7 C.F.R. §989.73(a)), by filing an inaccurate RAC-50 Form, Inventory of Free Tonnage Standard Quality Raisins on Hand, to the RAC for crop year 2002-2003.

6. The respondents violated section 989.73(a) of the Raisin Order (7 C.F.R. §989.73(a)), by filing an inaccurate RAC-51 Form, Inventory of Off-Grade Raisins on Hand, to the RAC for crop year 2002-2003.

7. The respondents violated section 989.58(d) of the Raisin Order (7 C.F.R. §989.58(d)), by failing to obtain incoming inspections for approximately 1,504,020 pounds of California raisins for crop year 2002-2003.

8. The respondents violated section 989.58(d) of the Raisin Order (7 C.F.R. §989.58(d)), on fifty-two occasions by failing to obtain incoming inspections for approximately 2,066,066 pounds of California raisins for crop year 2003-2004.

9. The respondents violated section 989.66 of the Raisin Order (7 C.F.R. §989.66) and section 989.166 of the Regulations (7 C.F.R. §989.166), by failing to hold in reserve for 294 days approximately 369.8 tons of California Natural Sun-dried Seedless raisins, and by failing to pay to the RAC $275,501.00, the dollar equivalent of the California raisins that were not held in reserve for crop year 2002-2003.

10. The respondents violated section 989.66 of the Raisin Order (7 C.F.R. §989.66) and section 989.166

of the Regulations (7 C.F.R. § 989.166), by failing to hold in reserve for 298 days approximately 305.6 tons of California Natural Sun-Dried Seedless raisins, and by failing to pay to the RAC $247,536.000, the dollar equivalent of the California raisins that were not held in reserve for crop year 2003-2004.

11. The respondents violated section 989.80 of the Raisin Order (7 C.F.R. §989.80), by failing to pay assessments to the RAC of approximately $3,438.10 for crop year 2002-2003.

12. The respondents violated section 989.80 of the Raisin Order (7 C.F.R. §989.80), by failing to pay assessments to the RAC of approximately $5,951.63 for crop year 2003-2004.

13. The respondents violated section 989.77 of the Raisin Order (7 C.F.R. §989.77), by failing to allow access to their records to the U.S. Department of Agriculture, even after being served with two subpoenas for such access.

Discussion

The handling of California raisins is subject to the requirements of the Raisin Order that came into being at the request of the raisin industry. The industry request was made to the Secretary of Agriculture pursuant to the AMAA that provides marketing tools for avoidance of disruption of the orderly exchange of agricultural commodities in interstate commerce (7 U.S.C. § 601). Among the marketing tools authorized by the AMAA for inclusion in marketing orders, are provisions that require handlers to comply with commodity

inspection provisions and reserve pool requirements that withhold for a time a portion of an agricultural commodity from the market in order to keep prices from being depressed and to yield an equitable distribution of the net returns realized in the future when the reserve is sold (7 U.S.C. § 608c(6)(E)and(F)). The AMAA also authorizes marketing orders to be administered by industry committees and for the issuance of rules and regulations to effectuate the provisions of the marketing order (7 U.S.C. § 608c(7)(C) and(D)). The constitutionality of marketing orders promulgated pursuant to the AMAA has been upheld by the Supreme Court:

> Appropriate respect for the power of congress to regulate commerce among the States provides abundant support for the constitutionality of these marketing orders . . . .

Glickman v. Wileman Bros. & Elliott, Inc., 521 U.S. 427, 476, 117 S. Ct. 2130, 2141, 138 L.Ed. 585 (1997).

Provisions in marketing orders that require handlers to hold a portion of a commodity in reserve and pay assessments to an Administrative Committee to defray its expenses cannot be used as grounds for a taking claim since handlers no longer have a property right that permits them to market their crop free of regulatory control. *Cal-Almond, Inc.*, 30 Fed Cl. 244, 246-247 (1994), *affirmed*, 73 F.3d 381, *cert. denied*, 519 U.S. 963 (1996).

Nor may a person classified as a handler by a marketing order and made subject to its regulatory control, successfully assert an equal protection

challenge when the Secretary has set forth a rational basis for the classification. *Lamers Dairy Inc.*, 60 Agric Dec. 406, at 428 (2001) *citing, F.C.C. v. Beach Communications, Inc.* 508 U.S. 307, 313 (1993),

In response to a request for a marketing order from the California raisin industry, a hearing was held at Fresno, California on December 13 through 16, 1948. Upon the basis of the evidence received at the hearing, a decision was issued that recommended the promulgation of the Raisin Order and enunciated a rational basis for its issuance and for its various terms and provisions (14 Fed Reg. 3083). Interested parties were given an opportunity to file written exceptions to the recommended decision (Ibid). Upon consideration of the exceptions that were filed and the record evidence presented at the hearing, the Secretary of Agriculture, on July 8, 1949, found that the issuance of the Raisin Order as set forth in the recommended decision, would effectuate the declared policy of the AMAA, and ordered that a referendum be conducted among producers of raisin variety grapes grown in California to determine whether at least two-thirds of them favored its issuance (14 Fed. Reg. 3858 and 3868). The referendum was conducted and the requisite percentage of producers was found to favor the Raisin Order's terms and provisions. Those terms and provisions, as periodically amended through subsequent rulemaking proceedings, were fully applicable and governed the handling of California raisins during the 2002-2003 and 2003-2004 crop years when respondents via their partnership Lassen Vineyards, acted as first handlers of raisins.

Marvin D. Horne, his family and the growers who joined his marketing association decided to enhance their profitability by avoiding the requirements of the Raisin Order. By so doing, respondents obtained an unfair competitive advantage over everyone in the raisin industry who complied with the Raisin Order and its regulations. That is what this proceeding is really about. Respondents' discussion of what *acquire* means and their expressed desire to achieve the policy of the Farmer-to-Consumer Direct Marketing Act are simply attempts to divert attention from their efforts to gain unfair advantage by freeing themselves from regulations the rest of their industry observed as the best way for all raisin growers and handlers to realize optimum prices.

The Raisin Order's regulatory provisions apply to "handlers" who "first handle" raisins. A "handler" is defined in the raisin order to include "any processor or packer" (7 C.F.R. § 989.15). A "packer" is defined as meaning "...any person who, within the area, stems, sorts, cleans, or seeds raisins, grades stemmed raisins, or packages raisins for market as raisins" (7 C.F.R. § 989.14). A handler becomes a "first handler" when he "acquires" raisins, a term specifically and plainly defined by the Raisin Order:

> *Acquire* means to have or obtain physical possession of raisins by a handler at his packing or processing plant or at any other established receiving station operated by him....*Provided*...., That the term shall apply only to the handler who first acquires raisins.

> 7 C.F.R. § 989.17, emphasis by underlining added.

Findings of Fact 7, 8 and 9, conclusively demonstrate that the respondents in their operation of the packing house they owned as Lassen Vineyards came within each of these definitions during crop years 2002-2003 and 2003-2004. As such they were required as a handler to: (1) cause an inspection and certification to be made of all natural condition raisins acquired or received (7 C.F.R. § 989.58(d)); (2) hold in storage all acquired reserve tonnage as established by the controlling Reserve tonnage regulation (7 C.F.R. § 989.66, and 7 C.F.R. § 989.166); (3) file certified reports showing inventory, acquisition and other information required by the Raisin Committee to enable it to perform its duties (7 C.F.R. § 73); (4) allow access to inspect the packing house premises, the raisins held there, and all records for the purposes of checking and verifying reports filed (7 C.F.R. § 989.77); and (5) pay assessment to the Raisin Committee with respect to free tonnage acquired, and any reserve tonnage released or sold for use in free tonnage outlets (7 C.F.R. § 989.80).

Respondents' arguments that they did not *acquire* raisins are unavailing in light of the plain meaning of the language of the Raisin Order defining *acquire*. Moreover, if there was any ambiguity, the interpretation given by the Department of Agriculture both at the time of the Raisin Order's issuance and in subsequent correspondence with the Hornes, is clear, straightforward, of long-standing and controlling. See *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 10

S.Ct. 2778, 81 L.Ed.2d 694 (1984); and *Barnhart v. Walton*, 535 U.S. 212, 122 S.Ct. 1265, 152 L.Ed.2d 330 (2002).

The 1949 proposed decision which was adopted as part of the Secretary's final decision, after explaining the need for the Raisin Order, explained the language employed and clarified that:

> The term "acquire" should mean to obtain possession of raisins by the first handler thereof. The significance of the term "acquire" should be considered in light of the definition of "handler" (and related definitions of "packer" and "processor") in that the regulatory features of the order would apply to any handler who acquires raisins. Regulation should take place at the point in the marketing channel where a handler first obtains possession of raisins, so that the regulatory provisions of the order concerning the handling of raisins would apply only once to the same raisins. Numerous ways by which handlers might acquire raisins were proposed for inclusion in the definition of the term, the objective being to make sure that all raisins coming within the scope of handlers' functions were covered and, conversely, to prevent a way being available whereby a portion of the raisins handled in the area would not be covered. Some of the ways by which a handler might obtain possession of raisins include: (i) Receiving them from

> producers, dehydrators, or others, whether by purchase, contract, or by arrangement for toll packing, or packing for a cash consideration;....

14 Fed. Reg. 3086 (1949).

This interpretation was consistent with testimony at the hearing conducted to consider the need of the raisin industry for a marketing order and its appropriate terms:

> Q. Mr. Hoak, suppose a packer stems, cleans, and performs other operations connected with the processing of raisins for a producer and then the producer sells the raisins to another packer. Under this proposal, which person should be required to set the raisins aside?
>
> A. The man who performs the packing operation, who is the packer.
>
> Q. Mr. Hoak, I believe that you have testified earlier that the term "packer" should include a toll packer. By that do you mean that it should include a person who takes raisins for someone for a fee?
>
> A. That is right.
>
> Q. Also, did I understand you to say that that person should be the one who would be required to set aside or establish the pools under the regulatory provisions?

> A. That is right. He is the man who would be held responsible for setting aside the required amount of raisins.
>
> Q. I take it that that man would not have title to any raisins as he is a toll packer; is that correct?
>
> A. That is right.

Hearing transcript at 182-183, see Appendix A.

These excerpts from the recommended decision and the hearing transcript were sent to an attorney representing Mr. and Mrs. Horne on April 23, 2001. Apparently, they believe their personal interpretation of the word *acquire* as used in the Raisin Order should take precedent over its plain language and the interpretation of its meaning that was conveyed to them by the Department of Agriculture. But under *Chevron* the interpretation by an agency of a regulation it issued in implementation of a statute is, unless illegal, controlling. The decision of the Hornes to not follow the Department of Agriculture's interpretative advice, and instead to play a kind of shell game with interlocking partnerships and a marketing association to try to conceal their role as first handler, only shows that they acted willfully and intentionally when they decided to not file reports, not hold raisins in reserve, not have incoming raisins inspected, not pay assessments, and not allow inspection of their records for verification purposes.

The respondents have also advanced the patently specious argument that they were exempted from handler obligations under the Raisin Order because they were attempting to promote the policy of the

Farmer-to-Consumer Direct Marketing Act of 1976, 7 U.S.C. §§ 3001-3006. Nowhere does the 1976 Act refer to the AMAA or make any suggestion that any of its terms have been supplanted. Moreover, the type of activity that the 1976 Act looked to encourage was the farmer market where farmer and consumer could come together directly and avoid middlemen. The respondents were instead marketing raisins to candy makers and food processors as ingredients.

Nor does the fact that the respondents primarily consider themselves to be producers exempt them from regulation by the Raisin Order for their performance of handler functions. The AMAA does exempt from a marketing order's regulation "any producer in his capacity as a producer" 7 U.S.C. § 608c(13)(B). This has given rise to specific but limited producer-handler exemption provisions in marketing orders that regulate the handling of milk. The potential harm, these exemptions may inflict on other producers and handlers was, however, recognized and explained in *United Dairymen of Arizona v. Veneman*, 279 F.3d 1160, 1165-1166 (9th Cir 2002).

In the instant proceeding, the respondents undertook to no longer confine themselves to producer functions but to also engage in handler functions that are regulated by the Raisin Order and are not within any exemption. The fact that a portion of the raisins they packed at the Lassen Vineyard packing house were raisins of their own production did not serve to exempt their handling and packing of those raisins from regulation. Mr. and Mrs. Horne had been specifically so advised by

letter, dated May 20, 2002, from the Administrator of AMS:

> You indicate in your correspondence that you plan to pack and market your own raisins. Such activities would make you a handler under the order. As a handler, you would be required to meet all of the order's regulations regarding volume control, quality control (incoming and outgoing inspection), assessments, and reporting to the RAC.

RX-101, Appendix B

Under these circumstances, the respondents should be ordered to pay the assessments they withheld from the RAC, pay the dollar equivalent of the raisins they failed to hold in reserve, and be assessed a civil penalty pursuant to 7 U.S.C. § 608c(14)(B).

In determining the amount of the civil penalty, I have reviewed the recommendation of AMS in light of applicable holdings by the Judicial Officer respecting the appropriate amount to be imposed for violations similar to those committed by the respondents. See Calabrese, 51 Agric. Dec. 131, 161 (1992); *Saulsbury Enterprises*, 55 Agric. Dec. 6, 52-58 (1996); and *Strebin Farms*, 56 Agric. 1095, 1152-1157 (1997). Intentional violations of a marketing order's requirements that a handler shall pay assessments, have inspections performed, hold a percentage of the raisins handled in reserve, and file specified reports have all been held to be serious violations of both the AMAA and or a controlling marketing order that fully warrant civil penalties of $1,100 for each

violation with "....each day during which such violation continues...deemed a separate violation...." (7 U.S.C. § 608c(14(B)).

Accordingly, I am following the recommendation of AMS that civil penalties be imposed on the respondents of $651,200, $1,100 per day for each of the 592 days of the crop years 2002-2003 and 2003-2004 that they failed to hold California raisins in reserve, and $80,300 for their failure to obtain inspections and file accurate reports. Civil penalties in these amounts are needed to deter the respondents from continuing to violate the Raisin Order and to deter others from similar or future violations. See Calabrese, *supra* at 162.

The following Order is herewith issued.

ORDER

It is ORDERED that respondents, Marvin D. Horne, Laura R. Horne and Don Durbahn, who do business as Lassen Vineyards, a general partnership, jointly and severally, are assessed a civil penalty of $731,500, are further ordered to pay to the Raisin Administrative Committee $9,389.73 in assessments for crop years 2002-2003 and 2003-2004, and are further ordered to pay to the Raisin Administrative Committee $523,037 for the dollar equivalent of the California raisins they failed to hold in reserve for crop years 2002-2003 and 2003-2004.

A certified check or money order in payment of the civil penalty shall be sent in the amount of $731,500 made payable to "Treasurer of the United States" to Frank Martin, Jr. or Babak A. Rastgoufard, Office of the General Counsel, Room 2343-South Bldg., United

States Department of Agriculture, Washington, DC 20250-1417. Payments of the $9,389.73 for owed assessments, and of the $523,037 for the dollar equivalent of the California raisins that were not held in reserve shall be sent to the Raisin Administrative Committee. These payments shall all be made within 100 days after this order becomes effective.

The provisions of this order shall become effective on the first day after this decision becomes final. Unless appealed pursuant to the Rules of Practice at 7 C.F.R. § 1.145(a), this decision becomes final without further proceedings 35 days after service as provided in the Rules of Practice, 7 C.F.R. § 1.142(c)(4).

Copies of this Decision and Order shall be served upon the parties.

Done at Washington, DC
this 8th day of December, 2006

/s/ Victor W. Palmer
Victor W. Palmer
Administrative Law Judge

UNITED STATES DEPARTMENT OF AGRICULTURE

BEFORE THE SECRETARY OF AGRICULTURE

In re:	)	AMAA
	)	Docket No.
Marvin D. Horne and Laura R.	)	04-0002
Horne, d/b/a Raisin Valley Farms,	)	
a partnership and d/b/a Raisin	)	
Valley Farms Marketing	)	
Association, a/k/a Raisin Valley	)	
Marketing, an unincorporated	)	
association	)	
	)	
and	)	
	)	
Marvin D. Horne, Laura R.	)	
Horne, Don Durbahn, and	)	
The Estate of Rena Durbahn, d/b/a	)	
Lassen Vineyards, a partnership,	)	
	)	
Respondents	)	

Decision and Order

PROCEDURAL HISTORY

The Administrator, Agricultural Marketing Service, United States Department of Agriculture [hereinafter the Administrator], instituted this disciplinary proceeding on April 1, 2004, by filing a Complaint alleging that, during crop years 2002-

2003 and 2003-2004, Marvin D. Horne and Laura R. Horne, d/b/a Raisin Valley Farms, did not comply with the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. §§ 601-674) [hereinafter the AMAA], and the federal order regulating the handling of Raisins Produced from Grapes Grown in California (7 C.F.R. pt. 989) [hereinafter the Raisin Order]. On October 25, 2004, the Administrator filed an Amended Complaint which made minor amendments to the Complaint. On August 10, 2005, with permission from Administrative Law Judge Victor W. Palmer [hereinafter the ALJ], the Administrator filed a Second Amended Complaint. In the Second Amended Complaint, the Administrator made amendments to conform the Complaint to the evidence presented at the hearing conducted on February 9-11, 2005, as well as to add Raisin Valley Farms Marketing Association, also known as Raisin Valley Marketing, an unincorporated association, and Marvin D. Horne, Laura R. Horne, Don Durbahn, and the Estate of Rena Durbahn, a partnership, d/b/a Lassen Vineyards, as parties to the proceeding.

Under the Raisin Order, handlers[1] who first handle the raisins are required to: (1) obtain

---

[1] The term "handler" means: (a) any processor or packer; (b) any person who places, ships, or continues natural condition raisins in the current of commerce from within the area to any point outside the area; (c) any person who delivers off-grade raisins, other failing raisins or raisin residual material to other than a packer or other than into any eligible non-normal outlet; or (d) any person who blends raisins: *Provided*, That blending shall not cause a person not otherwise a handler to be a handler on account of such blending if he is either: (1) a producer who, in his capacity as a producer, blends raisins entirely of his own

inspections of raisins acquired or received (7 C.F.R. § 989.5 8(d)); (2) hold acquired raisins designated as reserve tonnage for the account of the Raisin Administrative Committee [hereinafter the RAC] (7 C.F.R. §§ 989.66, .166); (3) file accurate reports with the RAC (7 C.F.R. § 989.73); (4) allow access to records to verify the accuracy of the records (7 C.F.R. § 989.77); and (5) pay assessments to the RAC (7 C.F.R. § 989.80).

Marvin D. Horne and the other respondents dispute that they are handlers claiming they never obtained any raisins through purchase or transfer of ownership to any of the business entities that Mr. Horne and his partners operate. Mr. Horne and his partners argue they did not *acquire* raisins within the meaning of the Raisin Order. They further argue they are not subject to the requirements of the Raisin Order because they are farmers/producers who have acted in good faith to advance the stated policy of the Farmer-to-Consumer Direct Marketing Act of 1976 (7 U.S.C. §§ 3001-3006).

The ALJ held an oral hearing in Fresno, California, on February 9-11, 2005 (Tr. I), and May 23, 2006 (Tr. II). Frank Martin, Jr., Office of the General Counsel, United States Department of Agriculture, represented the Administrator during the portion of the hearing conducted on February 9-

---

production in the course of his usual and customary practices of preparing raisins for delivery to processors, packers, or dehydrators; (2) a person who blends raisins after they have been placed in trade channels by a packer with other such raisins in trade channels; or (3) a dehydrator who, in his capacity as a dehydrator, blends raisins entirely of his own manufacture (7 C.F.R. § 989.15).

11, 2005. Babak A. Rastgoufard, Office of the General Counsel, United States Department of Agriculture, joined Mr. Martin during the May 23, 2006, portion of the hearing. David A. Domina and Michael Stumo, DominaLaw Group, Omaha, Nebraska, represented Mr. Horne and the other respondents.

On December 8, 2006, the ALJ issued a Decision and Order in which he found that Marvin D. Horne, Laura R. Horne, Don Durbahn, and Rena Durbahn, now deceased, acting together as partners doing business as Lassen Vineyards,[2] at all times material to this proceeding, acted as a handler of raisins subject to the inspection, assessment, reporting, verification, and reserve requirements of the Raisin Order. The ALJ further found that Mr. Horne and partners violated the AMAA and the Raisin Order by failing to obtain inspections of acquired incoming raisins, failing to hold requisite tonnages of raisins in reserve, failing to file accurate reports, failing to allow access to their records, and failing to pay requisite assessments.

The ALJ concluded that the Farmer-to-Consumer Direct Marketing Act of 1976 does not exempt farmers/producers who act as handlers from regulation under federal marketing orders. The ALJ further concluded that the violations by Mr. Horne and partners require the entry of an order directing them to pay the RAC assessments they have failed to pay and to pay the RAC the dollar equivalent of the

---

[2] In this Decision and Order, I refer to these respondents, as well as the partnership Raisin Valley Farms, as "Mr. Horne and partners" unless clarity dictates otherwise.

raisins they failed to hold in reserve. Moreover, the ALJ concluded that the violations were deliberate and were designed to obtain an unfair competitive advantage over other California raisin handlers who were in compliance with the Raisin Order. Pursuant to 7 U.S.C. § 608414)(B), the ALJ assessed Mr. Horne and partners a $731,500 civil penalty and ordered payment of $523,037 for the dollar equivalent of raisins not held in reserve and $9,389.73 for owed assessments.

On January 4, 2007, Marvin D. Horne and Laura R. Horne, d/b/a Raisin Valley Farms, and Marvin D. Horne, Laura R. Horne, and Don Durbahn, a partnership, d/b/a Lassen Vineyards, filed a timely petition for review of the ALJ's Decision and Order and requested oral argument before the Judicial Officer. The request for oral argument before the Judicial Officer, which the Judicial Officer may grant, refuse, or limit (7 C.F.R. § 1.145(d)), is refused because the issues have been fully briefed; thus, oral argument would appear to serve no useful purpose.

DECISION

Findings of Fact

Marvin D. Horne has been a farmer since 1969. Mr. Horne and his wife Laura R. Horne grow Thompson seedless grapes for raisins. Their grape-growing and raisin-producing activities operate under the registered trademark "Raisin Valley Farms." Raisin Valley Farms is one of the largest operations in the California valley where most of the world's raisins are produced (Tr. I at 868-69). Marvin D. Horne and Laura R. Horne also do

business as Raisin Valley Farms Marketing Association (also known as Raisin Valley Marketing). Both Raisin Valley Farms and Raisin Valley Farms Marketing Association have the same business mailing address in Kerman, California. (Tr. I at 873-74.)

During the 2002-2003 and 2003-2004 crop years, Marvin D. Horne and Laura R. Horne also operated a partnership with Laura's father, Don Durbahn, and Laura's mother, Rena Durbahn (now deceased). This partnership did business and continues to do business, as Lassen Vineyards, also in Kerman, California. Prior to 2002, Lassen Vineyards was exclusively a farming partnership that produced Thompson seedless grapes made into raisins (Tr. I at 870). In 2002, Lassen Vineyards started operating raisin packing plant equipment at the Kerman, California, location (Tr. I at 871-73).

In 1998, Marvin D. Horne and Laura R. Horne expressed an interest to the RAC about acting as a handler of California raisins under the Raisin Order (CX 94). In 1999, Marvin D. Horne and Laura R. Horne filed a fictitious name certificate in the Fresno (California) County Clerk's Office in which they adopted the name "Raisin Valley Farms" (CX 95, CX 96). Then, for crop years 2001-2002, 2002-2003, and 2003-2004, Mr. and Mrs. Horne, under the Raisin Valley Farms' name, filed RAC-5 forms, notifying the RAC of their intention to handle raisins as a packer under the Raisin Order (CX 98, CX 100, CX 102). During this time-frame, Mr. Horne served 6 years as an alternate member of the RAC (Tr. I at 175; CX 103, CX 104).

Lassen Vineyards is a partnership formed in 1995 by Marvin D. Horne, Laura R. Horne, Don Durbahn, and the late Rena Durbahn. The partnership was created "to engaged [sic] in farming and any other farming related business." (RX 12 at 1.) The partnership owned land in Kerman, California, where it produced raisins and operated a raisin packing plant. Don Durbahn and Marvin A. Horne, Mr. and Mrs. Marvin D. Horne's son, supervised the packing activities at Lassen Vineyards (Tr. I at 879-80). The workers who performed the packing activities at Lassen Vineyards were "leased employees" who were leased to Lassen Vineyards by a partnership of Laura R. Horne and Rena Durbahn (Tr. I at 933-34).

In crop years 2002-2003 and 2003-2004, Lassen Vineyards operated the packing plant to process (i.e., to stem, sort, clean, grade, and package) California raisins for themselves and, for a fee, for other raisin producers (Tr. I at 962; Tr. II at 25-27). During this time, Lassen Vineyards charged producers 12 cents per pound to pack raisins and $5 for each pallet upon which the boxed raisins were stacked (Tr. II at 28, 44). The cost for labor and packaging materials was included in the fee charged (Tr. II at 30-31, 44, 48). All raisins packed by Lassen Vineyards in crop years 2002-2003 and 2003-2004 were packaged in boxes stamped with the handler number 94-101. That number had been assigned to Marvin D. Horne and Laura R. Horne (Tr. I at 964-65). When questioned, Mr. Horne indicated that the difference between Lassen Vineyards and a toll packer was that the packed product could leave Lassen Vineyards without the farmer being required to pay fees up front (Tr. I at 979).

On numerous occasions, Mr. Horne exchanged communications with the United States Department of Agriculture and the RAC concerning the Raisin Order, including his responsibilities under the Raisin Order (CX 94, CX 105-CX 110; RX 91-RX 103, RX 105-RX 125, RX 127-RX 149). On March 15, 2001, Marvin D. Horne and Laura R. Horne, through their then attorney, wrote to the Secretary of Agriculture and asked whether the obligations of the Raisin Order regarding volume regulation, quality control, payment of assessments to the RAC, and reporting requirements would apply if Raisin Valley Farms had its raisins "custom packed" by a packer that would not take title to Raisin Valley Farms' raisins (RX 95). On April 23, 2001, the Deputy Administrator, Fruit and Vegetable Programs, United States Department of Agriculture, explained that under the scenario presented, Raisin Valley Farms would be neither a packer nor a handler, but that the custom packer would be both a packer and a handler. The Deputy Administer further explained that the custom packer "acquired" the raisins because it obtained physical possession of the raisins at a packing or processing plant. (7 C.F.R. § 989.17.) Furthermore, the custom packer would be "required to meet the order's obligations regarding volume regulation, quality control, payment of assessments to the Raisin Administrative Committee (RAC), and reporting requirements." (RX 98.) The Deputy Administrator also provided Mr. Horne with portions of the 1949 proposed rule making and rule making hearing testimony discussing the treatment of this activity under the Raisin Order. The testimony establishes that the Raisin Order was intended to

treat such custom packers (also called toll packers) as handlers (RX 98).

In a number of these communications, the Agricultural Marketing Service clearly informed Mr. Horne that his proposed activities would make him a handler subject to the Raisin Order. In a January 18, 2002, letter, Maureen T. Pello, Senior Marketing Specialist in the Fresno, California, Field Office of the Agricultural Marketing Service, told Mr. Horne that his proposed activities would make him a handler under the Raisin Order.

> As we discussed, based upon your description of your proposed activities, you would be considered a handler under the Federal marketing order for California raisins (order). As a handler, you would be required to meet all of the order's regulations regarding volume control, quality control (which includes incoming and outgoing inspection), assessments, and reporting to the Raisin Administrative Committee (RAC).

RX 100. On May 20, 2002, the Administrator responding to an e-mail and a letter sent by Mr. Horne stated:

> You indicate in your correspondence that you plan to pack and market your own raisins. Such activities would make you a handler under the order. As a handler, you would be required to meet all of the order's regulations regarding volume control, quality control (incoming and

outgoing inspection), assessments, and reporting to the RAC.

RX 101. Marvin D. Horne expressly disregarded the United States Department of Agriculture's interpretations of the terms of the Raisin Order that he requested. Mr. Horne did not use the custom packing firm to process his raisins, but rather, he elected to establish a family-owned packing operation at Lassen Vineyards where he packed raisins for his family, and, for a fee, Lassen Vineyards packed raisins for other growers (Tr. I at 977-78). Contrary to the advice Mr. Horne received from the United States Department of Agriculture, Lassen Vineyards did not pay any assessments, did not have any incoming inspections performed, did not file accurate reports, and did not hold any raisins in reserve with respect to any of the raisins Lassen Vineyards received from and packed for growers during the 2002-2003 and 2003-2004 crop years (Tr. I at 965-73).

During crop years 2002-2003 and 2003-2004, Mr. and Mrs. Horne also operated an unincorporated grower association named "Raisin Valley Farms Marketing Association." Mr. and Mrs. Horne created Raisin Valley Farms Marketing Association to "attract the market of buyers." (Tr. I at 876.) Sixty raisin growers were members of Raisin Valley Farms Marketing Association (Tr. II at 55). Membership in Raisin Valley Farms Marketing Association allowed the raisin growers to market their raisins under the Hornes' trade name "Raisin Valley Farms" (Tr. I at 874-78).

When a Raisin Valley Farms Marketing Association member sold raisins through the Raisin

Valley Farms Marketing Association, the association collected the purchase price from the buyer and deducted Lassen Vineyards' fee for the packing services as well as an accounting fee for Raisin Valley Farms Marketing Association and a contribution for a fund to protect members from customers who fail to pay. If the sale was negotiated through a broker, Raisin Valley Farms Marketing Association deducted a brokerage fee. After all the deductions were taken, Raisin Valley Farms Marketing Association remitted the balance to the grower. (Tr. II at 50-52.) Mr. Horne acknowledged that Lassen Vineyards benefitted from the fees it received from Raisin Valley Farms Marketing Association members (Tr. II at 52).

When Raisin Valley Farms Marketing Association received an order for raisins, Mr. Horne contacted one of the Raisin Valley Farms Marketing Association members inquiring if the member would accept the price offered. When Mr. Horne found a grower willing to accept the order, he told that grower when to bring the raisins to Lassen Vineyards' packing plant to be stemmed, sorted, cleaned, graded, and packaged (Tr. II at 55-57). The buyer picked up the packaged raisins and left a bill of lading. When the buyer paid for the raisins, Mr. Horne deposited the funds into an account. Originally, the funds were deposited into an account in the name of Mr. and Mrs. Horne. Mr. Horne changed the account to one named "Raisin Valley Farms Marketing, LLT." Now, Raisin Valley Farms Marketing Association has "a bone fide Association bank account" from which Mr. Horne, for Raisin Valley Farms Marketing Association, disburses

funds to Lassen Vineyards, the brokers, and the growers. (Tr. II at 58-60.)

On or about August 22, 2002, Marvin Horne, on behalf of Raisin Valley Farms, submitted an inaccurate RAC-1 Form, Weekly Report of Standard Raisin Acquisitions, to the RAC. Mr. Horne reported to the RAC that Raisin Valley Farms did not acquire any California raisins during the week ending August 3, 2002. (CX 62.) However, the record evidence shows that Raisin Valley Farms acquired more than 95,000 pounds of California raisins during this time period (CX 1, CX 2).

From September 5, 2003, to December 2, 2003, Laura Horne and/or Marvin Horne, on behalf of Raisin Valley Farms, submitted 13 inaccurate RAC-1 Forms, Weekly Report of Standard Raisin Acquisitions, to the RAC.[3] The Hornes reported to the RAC that they did not acquire any California raisins during this time period (CX 63-CX 75). However, the record evidence leads to the conclusion that they acquired substantial amounts of California raisins during this time period (CX 3-CX 56).

From August 1, 2003, to November 30, 2003, Marvin Horne, on behalf of Raisin Valley Farms, submitted four inaccurate RAC-20 Forms, Monthly Reports of Free Tonnage Raisin Disposition, to the RAC (CX 76-CX 79). Mr. Horne reported to the RAC that he did not ship or dispose of any California

---

[3] Each of the forms has the number "59" written on the upper left of the form. The number "59" is a packer number assigned by RAC for internal control (Tr. I at 189). In addition, each form has "Raisin Valley Farms" shown as the originating fax machine identifier (CX 63-CX 75).

raisins during this time period. However, the record evidence shows that Raisin Valley Farms shipped substantial amounts of California raisins during this time period (CX 3-CX 56, CX 247-CX 273).

During crop year 2002-2003, Marvin Horne, on behalf of Raisin Valley Farms, submitted an inaccurate RAC-50 Form, Inventory of Free Tonnage Standard Quality Raisins on Hand, to the RAC (CX 80). Mr. Horne reported to the RAC that Raisin Valley Farms did not have any California raisin inventories during this time period. However, the record evidence shows Raisin Valley Farms had inventories of California raisins in that Raisin Valley Farms was shipping substantial amounts of California raisins during this time period (CX 82-CX 87).

During crop year 2002-2003, Marvin Horne, on behalf of Raisin Valley Farms, submitted an inaccurate RAC-51 Form, Inventory of Off-Grade Raisins on Hand, to the RAC (CX 81). Mr. Horne reported to the RAC that Raisin Valley Farms did not have any California raisin inventories during this time period. However, the record evidence shows Raisin Valley Farms had inventories of California raisins in that Raisin Valley Farms was shipping substantial amounts of California raisins during this time period (CX 1, CX 2, CX 81-CX 87).

During crop year 2002-2003, Mr. Horne and partners failed to obtain incoming inspections of

California raisins on at least six occasions (CX 82-CX 87; Tr. I at 966-67).[4]

During crop year 2003-2004, Mr. Horne and partners failed to obtain incoming inspections of California raisins on at least 52 occasions (CX 3-CX 54, CX 56; Tr. I at 966-67).

During crop year 2002-2003, Mr. Horne and partners failed to hold in reserve for 294 days approximately 49,350 pounds of California Natural Sun-dried Seedless raisins (CX 82-CX 87, CX 88 at 2, CX 92 at 6). The producer price for raisins was $394.85 per ton (CX 161 at 3). Therefore, for the 2002-2003 crop year, Mr. Horne and partners failed to pay $9,742.93 to the RAC for compensation for failing to deliver any reserve raisins to the RAC.

During crop year 2003-2004, Mr. Horne and partners failed to hold in reserve for 298 days approximately 611,159 pounds of California Natural Sun-Dried Seedless raisins (CX 3-CX 56, CX 161). The producer price for raisins was $567 per ton (71 Fed. Reg. 29,565, 29,569 (May 23, 2006)). Therefore, for the 2003-2004 crop year, Mr. Horne and partners failed to pay $173,263.58 to the RAC for compensation for failing to deliver any reserve raisins to the RAC. For this crop year, the RAC

---

[4] The record does not contain direct evidence that Mr. Horne and partners "received" raisins but there is ample evidence that they "packed-out" raisins (CX 82-CX 87). Logic allows me to conclude that raisins cannot be "packed-out" unless they are received. Combine that conclusion with Mr. Horne's testimony that incoming inspections were not obtained leads to the holding that Mr. Horne and partners violated the Raisin Order by not obtaining incoming inspections on the raisins. (Tr. I at 966-67.)

issued two demand letters to the respondents to deliver reserve California raisins or to pay the dollar equivalent (RX 136, RX 137).

During crop year 2002-2003, Mr. Horne and partners failed to pay assessments to the RAC of approximately $222.60. During crop year 2003-2004, Mr. Horne and partners failed to pay assessments to the RAC of approximately $5,819.63.

Mr. Horne and partners failed to allow access to their records to the United States Department of Agriculture (CX 154; Tr. I at 422-24).

Conclusions of Law

1. The Secretary of Agriculture has jurisdiction in this matter.

2. On August 3, 2002, the respondents violated section 989.73(b) of the Raisin Order (7 C.F.R. § 989.73(b)) by submitting an inaccurate RAC-1 Form, Weekly Report of Standard Raisin Acquisitions, to the RAC.

3. From August 1, 2003, to November 30, 2003, the respondents violated section 989.73(b) of the Raisin Order (7 C.F.R. § 989.73(b)) by submitting 13 inaccurate RAC-1 Forms, Weekly Reports of Standard Raisin Acquisitions, to the RAC.

4. From August 1, 2003, to November 30, 2003, the respondents violated section 989.73(d) of the Raisin Order (7 C.F.R. § 989.73(d)) by submitting four inaccurate RAC-20 Forms, Monthly Reports of Free Tonnage Raisin Disposition, to the RAC.

5. The respondents violated section 989.73(a) of the Raisin Order (7 C.F.R. § 989.73(a)) by filing an

inaccurate RAC-50 Form, Inventory of Free Tonnage Standard Quality Raisins on Hand, to the RAC for crop year 2002-2003.

6. The respondents violated section 989.73(a) of the Raisin Order (7 C.F.R. § 989.73(a)) by filing an inaccurate RAC-51 Form, Inventory of Off-Grade Raisins on Hand, to the RAC for crop year 2002-2003.

7. The respondents violated section 989.58(d) of the Raisin Order (7 C.F.R. § 989.58(d)) by failing to obtain incoming inspections of California raisins on at least six occasions during crop year 2002-2003.

8. The respondents violated section 989.58(d) of the Raisin Order (7 C.F.R. § 989.58(d)) by failing to obtain incoming inspections of California raisins on 52 occasions during crop year 2003-2004.

9. The respondents violated sections 989.66 and 989.166 of the Raisin Order (7 C.F.R. §§ 989.66, .166) by failing to hold in reserve for 294 days approximately 49,350 pounds of California Natural Sun-dried Seedless raisins and by failing to pay to the RAC $9,742.93, the dollar equivalent of the California raisins that were not held in reserve for crop year 2002-2003.

10. The respondents violated sections 989.66 and 989.166 of the Raisin Order (7 C.F.R. §§ 989,66, .166) by failing to hold in reserve for 298 days approximately 611,159 pounds of California Natural Sun-Dried Seedless raisins and by failing to pay to the RAC $173,263.58, the dollar equivalent of the California raisins that were not held in reserve for crop year 2003-2004.

11. The respondents violated section 989.80 of the Raisin Order (7 C.F.R. § 989.80) by failing to pay assessments to the RAC of approximately $222.60 for crop year 2002-2003.

12. The respondents violated section 989.80 of the Raisin Order (7 C.F.R. § 989.80) by failing to pay assessments to the RAC of approximately $5,819.63 for crop year 2003-2004.

13. The respondents violated section 989.77 of the Raisin Order (7 C.F.R. § 989.77) by failing to allow access to their records to the United States Department of Agriculture.

Discussion

The handling of California raisins is subject to the requirements of the Raisin Order that resulted from a request of the California raisin industry. The industry made the request to the Secretary of Agriculture pursuant to the AMAA.

In response to the request for a marketing order, the United States Department of Agriculture held a hearing in Fresno, California, on December 13-16, 1948. Based on the evidence received at the hearing, a decision was issued that recommended the promulgation of the Raisin Order. The recommendation included a rational basis for issuance of the Raisin Order and for its various provisions (14 Fed. Reg. 3083 (June 8, 1949)). Interested parties were given an opportunity to file written exceptions to the recommended decision. *Ibid.* Upon consideration of the exceptions that were filed and the record evidence presented at the hearing, the Secretary of Agriculture, on July 8,

1949, found that the issuance of the Raisin Order, as set forth in the recommended decision, would effectuate the declared policy of the AMAA and ordered that a referendum be conducted among producers of raisin variety grapes grown in California to determine whether at least two-thirds of them favored its issuance (14 Fed. Reg. 3858, 3868 (July 13, 1949)). The referendum was conducted and the requisite percentage of producers was found to favor the Raisin Order's terms and provisions. Those terms and provisions, as periodically amended through subsequent rulemaking proceedings, were fully applicable and governed the handling of California raisins during the 2002-2003 and 2003-2004 crop years when Mr. Horne and partners acted as first handlers of raisins.

Mr. Horne and partners raised 12 issues in their appeal. In issue 12, Mr. Horne and partners contend the ALJ erroneously allowed the Administrator to add parties after the hearing was substantially completed.

Ordinarily, leave to amend should be freely given in the absence of prejudice to the opposing party. *Waits v. Weller*, 653 F.2d 1288, 1290 (9th Cir. 1981), citing *Wyshak v. City National Bank*, 607 F.2d 824, 826 (9th Cir. 1979). However, the issue of amending a complaint by adding an additional party after the initial hearing raises concerns. The decision to amend a complaint is within the discretion of the trial judge, keeping in mind the strong policy in favor of allowing amendment, and considering four factors: (1) bad faith, (2) undue delay, (3) prejudice to the opposing party, and (4) the futility of amendment. *Kaplan v. Rose*, 49 F.3d 1363, 1370 (9th Cir. 1994),

cert. denied, 516 U.S. 810 (1995), citing *DCD Programs, Ltd. v. Leighton*, 833 F.2d 183, 186 (9th Cir. 1987). Mr. Horne and partners, in their appeal, did not raise bad faith, delay, or futility as reasons for denying the amendments. Therefore, those issues are not before me.

Prejudice is the most important factor when determining if an amendment should be allowed. *Zeneth Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 330-31 (1971). The amendment of a complaint should be denied when a party suffers "undue prejudice" because of the amendment. *Chaveriat v. Williams Pipe Line Co.*, 11 F.3d 1420, 1430 (7th Cir. 1993). The determination whether there is sufficient prejudice to justify denying an amendment requires a balancing of the interests of the parties. The balancing

> entails an inquiry into the hardship to the moving party if leave to amend is denied, the reasons for the moving party failing to include the material in the original pleading, and the injustice resulting to the party opposing the motion should it be granted.

6 Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 1487 at 621-23 (2d ed. 1990).

For the reasons set forth below, I decline to reverse the ALJ's decision to allow the Administrator to amend the Complaint and add additional parties. First, and foremost, the decision to allow an amendment of a complaint lies within the discretion of the ALJ. Absent evidence that the ALJ abused

that discretion, the decision should stand. Mr. Horne and partners presented no argument to convince me that the ALJ abused his discretion. Furthermore, my own examination of the record convinces me that the ALJ's decision to allow the Administrator to add parties was correct.

The following transcript passage from Mr. Horne's counsel's opening statement at the hearing on February 9, 2005, shows Mr. Horne was warned about the possibility of the amendment.

> MR. DOMINA: Now, I want to return to the entities for just this brief moment. Lasson [sic] Vineyards, the partnership that consists of these two folks and Mrs. Horne's parents, own this pack-line. They own the equipment inside this partnership, a California general partnership Lasson [sic] Vineyards, that partnership is a stranger to this case. Lasson [sic] Vineyards—
>
> ADMINISTRATIVE [LAW] JUDGE PALMER: I might give you a word of warning. I recall some decisions by the Judicial Officer, past decisions, reviewing our decisions, not mine particularly, but saying that you can amend these complaints as you go along and they may well amend it to include them.
>
> MR. DOMINA: I'm aware of those decisions and I appreciate your comment.

Tr. I at 58-59. Furthermore, in the order authorizing the amendment to the Complaint adding parties, the ALJ made clear that "the new parties will be given the opportunity to present any evidence they believe is necessary to fully defend themselves from the amended complaint's allegations." (August 3, 2005, Order Authorizing Amendment of the Complaint To Conform To the Evidence.) The ALJ held five teleconferences with counsel between February 2006 and the hearing on May 23, 2006. At these teleconferences, the ALJ sorted out evidence, issues, and witness lists, issued subpoenas, and moved the hearing location at the request of Mr. Horne's counsel. On the morning of the hearing, additional off-the-record conferences resolved many of the issues prior to the hearing. On the afternoon of May 23, 2006, the ALJ presided over a hearing. Mr. Horne was the primary witness. At the conclusion of the hearing, there was no claim that the added parties needed more time to present their evidence (Tr. II at 261).

Although Mr. Horne and partners argue that the addition of the new parties should not have been allowed after the initial hearing, they must take significant responsibility for the Administrator's inability to identify all appropriate parties. On May 21, 2004, the ALJ set the date for the hearing as February 8-17, 2005, and ordered an exchange of witness lists, exhibit lists, and copies of exhibits. The ALJ ordered the Administrator to provide his documents by October 4, 2004. The Administrator filed his documents on September 20, 2004. The order also called for Mr. Horne and partners to provide their documents on November 15, 2004. The ALJ extended that deadline until December 15, 2004.

The record does not indicate that Mr. Horne and partners provided the documents in a timely fashion. On January 3, 2005, Mr. Horne was served with a subpoena duces tecum (CX 164) seeking records regarding his raisin operations. In response, Mr. Horne provided hearing exhibits RX 1-RX 152. Mr. Horne admitted he did not fully comply with the subpoena.[5] (Tr. I at 947.) Without Mr. Horne's records, the Administrator's inability to identify all the various intermingled entities involved in Mr. Horne's raisin operations before the initial hearing, is understandable.

Mr. Horne's business structure is confusing at best. There appear to be three main entities, Raisin Valley Farms, Lassen Vineyards, and Raisin Valley Farms Marketing Association. The main problem is that at various times Mr. Horne uses the name "Raisin Valley Farms" for each. Without Mr. Horne's personal knowledge, it is impossible to know which bank account in the name of Raisin Valley Farms is the account for which company. In fact, there was not a bank account in the name of Lassen Vineyards. (Tr. II at 58-60, 123-24.)

Raisin Valley Farms is a partnership between Marvin D. Horne and his wife Laura (Tr. I at 868). Mr. Horne grows grapes and makes raisins under the Raisin Valley Farms name. The Raisin Valley Farms name is trademarked. (Tr. I at 869.) Lassen Vineyards is a partnership between Marvin Horne,

---

[5] I note that in November 2002, the Agricultural Marketing Service issued an investigative subpoena seeking Mr. Horne's records (CX 154). Mr. Horne "refuse[d] to produce any records" sought by the investigative subpoena (RX 106; Tr. I at 432).

his wife Laura, and his father-in-law Don Durbahn.[6] (Tr. I at 869-70; RX 12.) Lassen Vineyards began as a farming operation, growing grapes and making raisins, adding a raisin packing facility on its property in 2002 (Tr. I at 870-71).

Another issue raised on appeal is Mr. Horne and partners' position that the Farmer-to-Consumer Direct Marketing Act of 1976 (7 U.S.C. §§ 3001-3006) exempts them from handler obligations under the Raisin Order because they were attempting to promote the policy of that statute. The ALJ found this argument "patently specious" and I agree. The Farmer-to-Consumer Direct Marketing Act does not exempt raisin producers from the requirements of the Raisin Order.

Furthermore, the type of activity that the Farmer-to-Consumer Direct Marketing Act sought to encourage was the farmers market where farmer and consumer could come together directly and avoid middlemen. Mr. Horne and partners presented no evidence that their activities, in fact, supported the goals of the Farmer-to-Consumer Direct Marketing Act. Mr. Horne and partners sold raisins in wholesale packaging and quantities, frequently to candy makers and other food processors as ingredients for other food products. Mr. Horne showed no connection between his business activities and the goals of the Farmer-to-Consumer Direct Marketing Act. Therefore, even if the Farmer-to-Consumer Direct Marketing Act exempted raisin producers from the mandates of the Raisin Order —

---

[6] The partnership also included Laura Horne's mother Rena Durbahn until Mrs. Durbahn passed away.

which it does not — Mr. Horne and partners failed to demonstrate compliance with the goals of the Farmer-to-Consumer Direct Marketing Act.

In their appeal, Mr. Horne and partners question the constitutionally of the Raisin Order. First and foremost, I have no authority to judge the constitutionality of the various statutes administered by the United States Department of Agriculture. *Califano v. Sanders*, 430 U.S. 99, 109 (1977) ("Constitutional questions obviously are unsuited to resolution in administrative hearing procedures"); *Robinson v. United States*, 718 F.2d 336, 338 (10th Cir. 1983) ("The agency is an inappropriate forum for determining whether its governing statute is constitutional"). Therefore, Mr. Horne and partners questioning of the constitutionality of the Raisin Order falls on legally deaf ears. I need not point out to Mr. Horne and partners that the Court of Federal Claims recently found the arguments made in this appeal to be unavailing. *Evans v. United States*, 74 Fed. Cl. 554 (2006). The United States Court of Appeals for the Federal Circuit affirmed the Court of Federal Claims Decision, 250 F. App'x 231 (2007), and the Supreme Court of the United States denied a petition for certiorari, 128 S. Ct. 1292 (2008). Until the appropriate court instructs me otherwise, I will treat the Raisin Order as constitutional, as I believe it to be.[7]

---

[7] Mr. Horne and partners suggest, at page 29 ¶ 102 of Respondents' Opening Brief On Appeal to Judicial Officer, USDA [hereinafter Respondents' Appeal Brief], that I might consider a "Rule 15(c)" proceeding the appropriate forum in which to address their constitutional argument. I need not address that question because, considering the results of the

The Raisin Order's provisions apply to "handlers" who "first handle" raisins. A "handler" is defined in the raisin marketing order to include "any processor or packer" (7 C.F.R. § 989.15). A "packer" is defined as "any person who, within the area, stems, sorts, cleans, or seeds raisins, grades stemmed raisins, or packages raisins for market as raisins" (7 C.F.R. § 989.14). A handler becomes a "first handler" when he "acquires" raisins, a term specifically and plainly defined by the Raisin Order:

> **§ 989.17 Acquire.**
>
> *Acquire* means to have or obtain physical possession of raisins by a handler at his packing or processing plant or at any other established receiving station operated by him: . . . *Provided further*, That the term shall apply only to the handler who first acquires raisins.

7 C.F.R. § 989.17.

The record demonstrates that Mr. Horne and partners, in their operation of the packing house known as Lassen Vineyards, came within each of these definitions during crop years 2002-2003 and 2003-2004. As such, they were required as a handler to: (1) cause an inspection and certification to be made of all natural condition raisins acquired or received (7 C.F.R. § 989.58(d)); (2) hold in storage all acquired reserve tonnage as established by the controlling reserve tonnage regulation (7 C.F.R. §§ 989.66, .166); (3) file certified reports showing:

Evans case, conducting a "Rule 15(c)" proceeding would not alter the results.

inventory, acquisition, and other information required by the RAC to enable it to perform its duties (7 C.F.R. § 989.73); (4) allow the RAC access to inspect the premises, the raisins held, and all records for the purposes of checking and verifying reports filed (7 C.F.R. § 989.77); and (5) pay assessments to the RAC with respect to free tonnage acquired and any reserve tonnage released or sold for use in free tonnage outlets (7 C.F.R. § 989.80).

Mr. Horne and partners' arguments that they did not acquire raisins are unavailing in light of the plain meaning of the language of the Raisin Order defining the term "acquire." Moreover, if there were any ambiguity, the interpretation given by the United States Department of Agriculture both at the time of the issuance of the Raisin Order and in subsequent correspondence with the Hornes, is clear, straightforward, of long-standing, and controlling. *See Barnhart v. Walton*, 535 U.S. 212 (2002); *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

The 1949 recommended decision, which was adopted as part of the Secretary of Agriculture's final decision, explained the language employed and clarified that:

> The term "acquire" should mean to obtain possession of raisins by the first handler thereof. The significance of the term "acquire" should be considered in light of the definition of "handler" (and related definitions of "packer" and "processor"), in that the regulatory features of the order would apply to any handler who acquires raisins. Regulation should take place at

> the point in the marketing channel where a handler first obtains possession of raisins, so that the regulatory provisions of the order concerning the handling of raisins would apply only once to the same raisins. Numerous ways by which handlers might acquire raisins were proposed for inclusion in the definition of the term, the objective being to make sure that all raisins coming within the scope of handlers' functions were covered and, conversely, to prevent a way being available whereby a portion of the raisins handled in the area would not be covered. Some of the ways by which a handler might obtain possession of raisins include: (i) Receiving them from producers, dehydrators, or others, whether by purchase, contract, or by arrangement for toll packing, or packing for a cash consideration[.]

14 Fed. Reg. 3083, 3086 (June 8, 1949).

This interpretation is consistent with testimony at the hearing conducted to consider the need of the raisin industry for a marketing order and its appropriate terms:

> Q Mr. Hoak, suppose a packer stems, cleans, and performs other operations connected with the processing of raisins for a producer and then the producer sells the raisins to another packer. Under this proposal, which person should be required to set the raisins aside?

A The man who performs the packing operation, who is the packer.

Q Mr. Hoak, I believe that you have testified earlier that the term "packer" should include a toll packer. By that do you mean that it should include a person who takes raisins for someone else for a fee?

A That is right.

Q Also, did I understand you to say that that person should be the one who would be required to set aside or establish the pools under the regulatory provisions?

A That is right. He is the man who would be held responsible for setting aside the required amount of raisins.

Q I take it that that man would not have title to any raisins insofar as he is a toll packer; is that correct?

A That is right.

ALJ Decision and Order, App. A.

These excerpts from the recommended decision and the hearing transcript were sent to an attorney representing Mr. and Mrs. Horne on April 23, 2001. Apparently, they believe their personal interpretation of the term "acquire" as used in the Raisin Order should take precedence over the plain language of the Raisin Order and the interpretation of its meaning that was conveyed to them by the United States Department of Agriculture. The decision of Mr. Horne and partners not to follow the United States Department of Agriculture's

interpretative advice, and, instead, to play a kind of shell game with interlocking partnerships and a marketing association to try to conceal their role as first handler, only shows that they acted willfully and intentionally when they decided not to file accurate reports, not to hold raisins in reserve, not to have incoming raisins inspected, not to pay assessments, and not to allow inspection of their records for verification purposes.

In simple terms, Mr. Horne and partners, as a matter of law, acquired raisins, as first handlers, when raisins arrived at the processing/packing facility known as Lassen Vineyards. Their arguments that title to the raisins never transferred from the grower to Mr. Horne and partners under California law is unavailing. California law does not control, the Raisin Order does. Under the Raisin Order, the term "acquire" is a term of art that does not encompass an ownership interest but rather physical possession. Mr. Horne and partners obtained physical possession of — thus they "acquired" — raisins when a grower brought raisins to the facility.

I also must address Mr. Horne and partners' position that they did not process the raisins but merely leased equipment to producers who processed their own raisins. The argument defies common sense. Mr. Horne and partners own raisin processing equipment. Growers bring raisins to the facility for processing. The grower pays Mr. Horne and partners for use of the equipment not by the hour or day like most equipment leases but by the pound, i.e., the amount of product processed. That price includes supervision of the equipment by Mr.

Horne's son, whose salary is paid by the partnership. The price also includes other workers who are provided by a different, but interlocking, partnership consisting of two members of the Lassen Vineyards partnership, Mr. Horne's wife and mother-in-law. In addition, the "lease" price also includes all packing material (on which Mr. Horne's handler number has been imprinted). Furthermore, the grower "leasing" the equipment need not stay at the facility during the use of the equipment but can leave the location allowing Lassen Vineyards' employees to supervise the processing. Mr. Horne and partners can call what they do a "lease" or anything else they might want to call it, but the reality is that Mr. Horne and partners are processing/handling raisins.

Mr. Horne and partners argue the ALJ erred by failing to use a higher standard of proof than preponderance of the evidence (Respondents' Appeal Brief at 32-35). Reviewing their earlier filings before the ALJ, I found no suggestion to the ALJ that a higher standard of proof should be utilized. Absent such a suggestion to the ALJ, I am reluctant to reverse the ALJ's use of the preponderance of the evidence standard. However, to satisfy myself that the appropriate standard was applied, I reviewed the argument. I found the argument significantly lacking. While there are proceedings in which a greater standard is appropriate,[8] this proceeding is not one of them. Mr. Horne and partners did not demonstrate that a standard of proof higher than the

---

[8] See, e.g., *Santosky v. Kramer*, 455 U.S. 745 (1982) (proceeding to terminate parental rights); *Addington v. Texas*, 441 U.S. 418 (1979) (involuntary commitment proceeding); *Woodby v. INS*, 385 U.S. 276 (1966) (deportation).

preponderance of the evidence standard was appropriate. Therefore, I hold that the ALJ's use of the preponderance of the evidence standard was not error.

Mr. Horne and partners also argue the Administrator failed to meet his burden to prove the case by a preponderance of the evidence.[9] I disagree. I do not provide a laundry list of "fact[s] sought to be proved," but I note that I read the entire transcript and examined the evidence. The greater weight of that evidence leaves me with but one conclusion which is that Marvin Horne and partners put in place a scheme to enhance their profitability by avoiding the requirements of the Raisin Order. By so doing, they obtained an unfair competitive advantage over everyone in the raisin industry who complied with the Raisin Order.

The Administrator alleges that Mr. Horne and partners violated section 989.77 of the Raisin Order (7 C.F.R. § 989.77) "by failing to allow access to their records to the U.S. Department of Agriculture, even after being served with two subpoenas for such access." (Second Amended Compl. at 5 ¶ 12.) Mr. Horne and partners deny this allegation stating "[t]here was no evidence of noncompliance with

---

[9] Preponderance of evidence. Evidence which is of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not [citation omitted]. With respect to burden of proof in civil actions, means greater weight of evidence, or evidence which is more credible and convincing to the mind. That which best accords with reason and probability. Black's Law Dictionary 1064 (5th ed. 1979).

subpoenas, information requests, or failure to fully comply with Government requests for data." (Respondents' Appeal Brief at 30 ¶ 104.) The record belies that claim showing that Mr. Horne failed to allow access as required by section 989.77 of the Raisin Order (7 C.F.R. § 989.77).

The Raisin Order makes clear that handlers shall provide access to their facilities and records, as follows:

> **§ 989.77 Verification of reports and records.**
>
> For the purpose of checking and verifying reports filed by handlers and records prescribed in or pursuant to this amended subpart, the committee, through its duly authorized representatives, shall have access to any handler's premises during regular business hours and shall be permitted at any such times to inspect such premises and any raisins held by such handler, and any and all records of the handler with respect to the holding or disposition of raisins by him and promotion and advertising activities conducted by handlers under § 989.53.

7 C.F.R. § 989.77.

On August 29, 2001, Maria Martinez Esguerra, a compliance officer for the Agricultural Marketing Service in the Fresno, California, office, was assigned to investigate whether Mr. Horne was packing and shipping raisins without obtaining inspections (Tr. I at 420). During the course of her investigation, Ms. Esguerra met with Mr. Horne and asked to review his raisin production, acquisition, sales, and

disposition records (Tr. I at 421). Mr. Horne told Ms. Esguerra "that he would not release any information without a subpoena." (Tr. I at 421.)

Ms. Esguerra's testimony continued:

> On May 14 I had prepared a subpoena, a request for a subpoena for the administrator. But my declaration here also stated basically in my conversation or interview with Mr. Horne to which he had admitted to me that he produced and packed organic raisins during the crop years 2000 and 2001.
>
> There were other questions that I had asked, and I'd asked him about if he had packed organic raisins in cellophane bags and he said he did. In fact he even showed us the sizes of those cello packaged raisins.
>
> They were in sizes 16 ounces, 8 ounce and 1.5 ounces. However, he disclosed to, he did - he refused to disclose any more information regarding his sales.
>
> He has raisin production and acquisition records, and sales and dispositions, but again he said he would not release any information without a subpoena.
>
> Following that we had a subpoena prepared, and on November 26 I receive that, and I subsequently served it to Mr. Horne on that same day.
>
> On December 9, I went back to the house of Marvin Horne on Modoc Avenue

> pursuant to that subpoena, and I asked if I could speak with him and he met me at the door. He told me why he will not produce any records for me to review.

Tr. I at 421-23. Ms. Esguerra was asked: "After you served Mr. Horne with the subpoena, did he produce any records?" She responded: "No, he did not." (Tr. I at 423-24.)

Ms. Esguerra's testimony demonstrates that she sought access to Mr. Horne and partners' records which she is authorized to do under the Raisin Order. Mr. Horne refused unless Ms. Esguerra obtained a subpoena. Even though a subpoena is not required under the Raisin Order, Ms. Esguerra obtained one (CX 154). When she presented the subpoena to Mr. Horn; he still refused to comply with the Raisin Order and give her access to the records. Therefore, I conclude Mr. Horne and partners violated section 989.77 of the Raisin Order (7 C.F.R. § 989.77) by refusing to provide Ms. Esguerra access to their records.

There are three components of the Order in this Decision and Order that mandate Mr. Horne and partners make monetary payments as a result of their violations of the Raisin Order. First, the Raisin Order requires a handler, who fails to deliver reserve tonnage, to compensate the RAC, as follows:

§ 989.166 Reserve tonnage generally.

> . . . .
>
> (c) *Remedy in the event of failure to deliver reserve tonnage raisins.* A handler who fails to deliver to the Committee, upon request, any reserve

> tonnage raisins in the quantity and quality for which he has become obligated . . . shall compensate the Committee for the amount of the loss resulting from his failure to so deliver.

7 C.F.R. § 989.166(c). This provision of the Raisin Order leaves me no discretion on the matter and requires that I order Mr. Horne and partners to compensate the RAC for the reserve tonnage raisins they failed to deliver to the RAC. The Raisin Order also instructs me as to how to calculate the compensation owed by Mr. Horne and partners to the RAC.

> **§ 989.166 Reserve tonnage generally.**
>
> . . . .
>
> (c) *Remedy in the event of failure to deliver reserve tonnage raisins.* . . . The amount of compensation for any shortage of tonnage shall be determined by multiplying the quantity of reserve raisins not delivered by the latest weighted average price per ton received by producers during the particular crop year for free tonnage raisins of the same varietal type or types.

7 C.F.R. § 989.166(c).

For the 2002-2003 crop year, Mr. Horne and partners packed out 98,550 pounds of raisins (CX 82-CX 87). Applying the shrinkage factor (CX 92 at 6) for weight loss during processing, Mr. Horne and partners received 105,000 pounds of raisins in the 2002-2003 crop year. The reserve obligation for the 2002-2003 crop year was 47 percent (CX 88 at 2).

Mr. Horne and partners' reserve obligation for that crop year was 49,350 pounds (.47 x 105,000 = 49,350). The producer price for raisins was $394.85 per ton (CX 161 at 3). Therefore, for the 2002-2003 crop year, Mr. Horne and partners owe $9,742.93 to the RAC for compensation for failing to deliver any reserve raisins to RAC (49,350 pounds divided by 2000 pounds per ton = 24.675 tons; 24.675 tons x $394.85 per ton equals $9,742.93).

Similarly, for the 2003-2004 crop year, Mr. Horne and partners packed out 1,965,650 pounds of raisins (CX 3-CX 56). These raisins included natural seedless raisins and other varieties. Applying the 2003-2004 shrinkage factor for each variety indicates that Mr. Horne and partners received 2,066,066 pounds of raisins in the 2003-2004 crop year. Of the 2,066,066 pounds of raisins received, 2,037,196 pounds were natural seedless raisins subject to the 30 percent reserve obligation (CX 161). Mr. Horne and partners' reserve obligation for the 2003-2004 crop year was 611,159 pounds (.30 x 2,037,196 = 611,158.8). The producer price for raisins was $567 per ton (71 Fed. Reg. 29,565, 29,569 (May 23, 2006)).[10] Therefore, for the 2003-2004 crop year, Mr.

---

[10] The Agricultural Marketing Service calculated the 2003-2004 reserve obligation compensation using a producer price of $810 per ton. The record citation for this producer price is CX 93, the RAC marketing policy for the 2003-2004 crop year. The RAC marketing policy for the 2003-2004 crop year mentions a "probable price" at $810 per ton (CX 93 at 4). However, the interim final rule setting the Final Free and Reserve Percentages for the 2005-2006 crop year identifies the producer prices for the 2003-2004 crop year as $567 (71 Fed. Reg. 29,565, 29,569 (May 23, 2006)). The Administrator's Brief in Opposition to Respondents' Appeal of the ALJ's Decision and

Horne and partners owe $173,263.58 to the RAC for compensation for failing to deliver any reserve raisins to the RAC (611,159 pounds divided by 2000 pounds per ton = 305.5795 tons; 305.5795 tons x $567 per ton equals $173,263.58).

The Raisin Order requires that each handler contribute to the costs associated with operating the RAC, as follows:

> § 989.80 Assessments.
>
> (a) Each handler shall, with respect to free tonnage acquired by him, . . . pay to the committee, upon demand, his pro rata share of the expenses . . . which the Secretary finds will be incurred, as aforesaid, by the committee during each crop year. . . . Such handler's pro rata share of such expenses shall be equal to the ratio between the total free tonnage acquired by such handler . . . during the applicable crop year and the total free tonnage acquired by all handlers . . . during the same crop year.

7 C.F.R. § 989.80(a). The assessment rate was established at $8 per ton (CX 90).

As noted in this Decision and Order, *supra*, for the 2002-2003 crop year, Mr. Horne and partners received 105,000 pounds of raisins. The reserve obligation for the 2002-2003 crop year was 47

Order was filed well after the date the producer prices were published in the Federal Register. The Administrator had an obligation to notify me that the original calculations were erroneous.

percent, therefore, the free tonnage was 53 percent (CX 88 at 2). Mr. Horne and partners' free tonnage for that crop year was 55,650 pounds (.53 x 105,000 = 55,650). Mr. Horne and partners' assessment obligation for the 2002-2003 crop year is $222.60 (55,650 pounds divided by 2000 pounds per ton = 27.825 tons; 27.825 tons x $8 per ton = $222.60).

The calculation of the assessment for the 2003-2004 crop year is complicated by the multiple varieties processed during that year, including varieties without reserve requirements. Mr. Horne and partners received 2,066,066 pounds of raisins in the 2003-2004 crop year. Of the 2,066,066 pounds of raisins received, 2,037,196 pounds were natural seedless raisins subject to the 30 percent reserve obligation (CX 161). The free tonnage of natural seedless raisins was 1,426,037.2 pounds (.70 x 2,037,196 = 1,426,037.2). In addition, there were 28,870 pounds of other varieties which were all free tonnage (2,066,066 - 2,037,196 = 28,870). Thus, the total free tonnage for the 2003-2004 crop year was 1,454,907.2 pounds. At an assessment rate of $8 per ton, Mr. Horne and partners' assessment obligation for the 2003-2004 crop year is $5,819.63 (1,454,037.2 pounds divided by 2000 pounds per ton = 727.4536 tons; 727.4536 tons x $8 per ton = $5,819.63). The total assessment due to the RAC by Mr. Horne and partners for both crop years is $6,042.23.[11]

---

[11] The Administrator, as the party seeking enforcement of the Raisin Order, should have provided a better road map to calculate both the assessment and compensation for failing to deliver any reserve raisins to the RAC. The Administrator should have provided a specific formula for determining the

I find it necessary to briefly note that, although the Raisin Order requires payment of the assessment "upon demand" and the record contains no evidence of such demand for the 2002-2003 crop year, my decision ordering payment is appropriate. I conclude Mr. Horne and partners' failure to file accurate forms with the RAC noting the volume of raisins processed incapacitated the RAC ability to make the demand for payment of the assessment. The RAC 1999-2000 Analysis Report states:

> The documentation of deliveries, on an individual grower basis, establishes the database on which most other functions are based. This includes: the accountability of all raisin deliveries, responsibility of packers' administrative assessments, packers' reserve pool obligations and the basis upon which the RAC staff distributes reserve pool equity to the grower.

RX 70 at 8. Without the information to determine the amounts of payment, the RAC could not demand the payment. Now that I have calculated the amount of the administrative assessments and reserve pool obligations, those amounts are due and payable.

The AMAA authorizes civil penalties for violations of marketing orders, such as the Raisin Order, issued under the AMAA.

---

money owed as well as a record cite where each number utilized in the calculation of the money owed could be located.

§ 608c. Orders

. . . .

(14) Violation of order

. . . .

(B) Any handler subject to an order issued under this section, or any officer, director, agent, or employee of such handler, who violates any provision of such order may be assessed a civil penalty by the Secretary not exceeding $1,000 for each such violation. Each day during which such violation continues shall be deemed a separate violation. . . . The Secretary may issue an order assessing a civil penalty under this paragraph only after notice and an opportunity for an agency hearing on the record. Such order shall be treated as a final order reviewable in the district courts of the United States in any district in which the handler subject to the order is an inhabitant, or has the handler's principal place of business. The validity of such order may not be reviewed in an action to collect such civil penalty.

7 U.S.C. § 608c(14)(B) (Supp. V 2005).[12]

---

[12] Pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended (28 U.S.C. § 2461 note), the Secretary of Agriculture, by regulation, adjusted the civil monetary penalty that may be assessed under the AMAA

In determining the amount of the civil penalty for violations of the Raisin Order, certain factors should be considered including:

> nature of the violations, the number of violations, the damage or potential damage to the regulatory program from the type of violations involved here, the amount of profit potentially available to a handler who commits such violations, prior warnings or instructions given to [the violator], and any other circumstances shedding light on the degree of culpability involved.

In re Onofrio Calabrese, 51 Agric. Dec. 131, 154-55 (1992), *aff'd sub nom. Balice v. USDA*, No. CV–F-92-5483–GEB (E.D. Cal. July 14, 1998), *printed in* 57 Agric. Dec. 841 (1998), *aff'd*, 203 F.3d 684 (9th Cir. 2000), *reprinted in* 59 Agric. Dec. 1 (2000).

I have reviewed the recommendation of the Administrator regarding a civil penalty. I have examined the factors to be considered for determining the amount of the civil penalty. I examined the actions of Mr. Horne and partners as these actions relate to the factors, including an examination of their tax returns (RX 13) to determine the impact of the violations on the revenue generated by the partners. I find that intentional violations of the Raisin Order's requirements that a handler shall pay assessments, have inspections performed, hold a percentage of the

---

(7 U.S.C. § 608c(14)(B)) for each violation of a marketing order, by increasing the maximum civil penalty from $1,000 to $1,100 (7 C.F.R. § 3.91(b)(vii) (2005)).

raisins handled in reserve, and file specified reports are serious violations of both the AMAA and the Raisin Order. Furthermore, I find the violations by Mr. Horne and partners significantly increased the revenue generated by the partnership (RX 13). Therefore, I conclude a significant civil penalty is warranted to deter Mr. Horne and partners, as well as other handlers, from committing similar violations in the future.

As discussed in this Decision and Order, *supra*, I have found that Mr. Horne and partners committed the following violations:

- Twenty violations of section 989.73 of the Raisin Order (7 C.F.R. § 989.73) by filing inaccurate reporting forms to the RAC on 20 occasions.

- Fifty-eight violations of section 989.58(d) of the Raisin Order (7 C.F.R. § 989.58(d)) by failing to obtain incoming inspections of raisins on 58 occasions.

- Two violations of section 989.80 of the Raisin Order (7 C.F.R. § 989.80) by failing to pay assessments to the RAC in crop year 2002-2003 and crop year 2003-2004.

- Five hundred ninety-two violations of sections 989.66 and 989.166 of the Raisin Order (7 C.F.R. §§ 989.66, .166) by failing to hold raisins in reserve and by failing to pay the RAC the dollar

equivalent of the raisins not held in reserve.

- One violation of section 989.77 of the Raisin Order (7 C.F.R. § 989.77) by failing to allow the Agricultural Marketing Service to have access to their records.

The appropriate civil penalties for these violations are: (1) $300 per violation for filing inaccurate reporting forms, in violation of 7 C.F.R. § 989.73, for a total of $6,000; (2) $300 per violation for the failure to obtain incoming inspections, in violation of 7 C.F.R. § 989.58(d), for a total of $17,400; (3) $1,000 for the failure to allow access to records, in violation of 7 C.F.R. § 989.77; (4) $300 per violation for the failure to pay the assessments, in violation of 7 C.F.R. § 989.80, for a total of $600; and (5) $300 per violation for the failure to hold raisins in reserve, in violation of 7 C.F.R. §§ 989.66, .166, for a total of $177, 600. The total civil penalties assessed against Mr. Horne and partners for violating the Raisin Order in the 2002-2003 and 2003-2004 crop years is $202,600. I conclude that civil penalties in these amounts are sufficient to deter Mr. Horne and partners from continuing to violate the Raisin Order and will deter others from similar future violations.

For the foregoing reasons, the following Order is issued.

ORDER

1. Marvin D. Horne, Laura R. Horne, Don Durbahn, Lassen Vineyards, a partnership, and

Raisin Valley Farms, a partnership, jointly and severally, are assessed a $202,600 civil penalty. The civil penalty shall be paid by certified check or money order made payable to the "Treasurer of the United States" and sent to:

Frank Martin, Jr.
United States Department of Agriculture
Office of the General Counsel
Marketing Division
Room 2343-South Building
Washington, DC 20250-1417

Payment of the civil penalty shall be sent to Mr. Martin within 100 days after this Order becomes effective.

2. Marvin D. Horne, Laura R. Horne, Don Durbahn, Lassen Vineyards, a partnership, and Raisin Valley Farms, a partnership, jointly and severally, are ordered to pay to the RAC $6,042.23 in assessments for crop years 2002-2003 and 2003-2004, and $183,006.51 for the dollar equivalent of the California raisins they failed to hold in reserve for crop years 2002-2003 and 2003-2004. Payments of the $6,042.23 for owed assessments and of the $183,006.51 for the dollar equivalent of the California raisins that were not held in reserve shall be sent to the RAC within 100 days after this Order becomes effective.

3. This Order shall become effective on the day after service on Marvin D. Horne, Laura R. Horne, Don Durbahn, Lassen Vineyards, a partnership, and Raisin Valley Farms, a partnership.

RIGHT TO JUDICIAL REVIEW

Marvin D. Horne, Laura R. Horne, Don Durbahn, Lassen Vineyards, a partnership, and Raisin Valley Farms, a partnership, have the right to obtain review of the Order in this Decision and Order in any district court of the United States in which they are inhabitants or have their principal place of business.[13]

Done at Washington, DC

April 11, 2008

/s/ William G. Jenson
William G. Jenson
Judicial Officer

---

[13] 7 U.S.C. § 608c(14)(B).

UNITED STATES DEPARTMENT OF AGRICULTURE

BEFORE THE SECRETARY OF AGRICULTURE

In re:	)	AMAA
	)	Docket No.
Marvin D. Horne and Laura R.	)	04-0002
Horne, d/b/a Raisin Valley Farms,	)	
a partnership and d/b/a Raisin	)	
Valley Farms Marketing	)	
Association, a/k/a Raisin Valley	)	
Marketing, an unincorporated	)	
association	)	
	)	
and	)	
	)	
Marvin D. Horne, Laura R.	)	
Horne, Don Durbahn, and	)	
The Estate of Rena Durbahn, d/b/a	)	
Lassen Vineyards, a partnership,	)	
	)	
Respondents	)	

Order Granting Petition To Reconsider

PROCEDURAL HISTORY

On December 8, 2006, Administrative Law Judge Victor W. Palmer [hereinafter the ALJ] issued a Decision and Order in which he found that Marvin D. Horne, Laura R. Horne, Don Durbahn, and Rena Durbahn, now deceased, acting together as partners

doing business as Lassen Vineyards,[1] at all times material to this proceeding, acted as a handler of raisins subject to the inspection, assessment, reporting, verification, and reserve requirements of the federal order regulating the handling of Raisins Produced from Grapes Grown in California (7 C.F.R. pt. 989) [hereinafter the Raisin Order]. The ALJ further found that Mr. Horne and partners violated the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. §§ 601-674) [hereinafter the AMAA], and the Raisin Order by failing to obtain inspections of acquired incoming raisins, failing to hold requisite tonnages of raisins in reserve, failing to file accurate reports, failing to allow access to their records, and failing to pay requisite assessments. Pursuant to 7 U.S.C. § 608c(14)(B), the ALJ assessed Mr. Horne and partners a $731,500 civil penalty and ordered payment of $523,037 for the dollar equivalent of raisins not held in reserve and $9,389.73 for owed assessments.

On January 4, 2007, Mr. Horne and partners filed a timely petition for review of the ALJ's Decision and Order. On April 11, 2008, I issued a Decision and Order in which I found Mr. Horne and partners violated the Raisin Order (7 C.F.R. §§ 989.66, .166) by failing to hold in reserve California Natural Sun-dried Seedless raisins and by failing to pay to the Raisin Administrative Committee [hereinafter the RAC] the dollar equivalent of the California raisins that were not held in reserve for crop year 2002-2003

---

[1] In this Order Granting Petition To Reconsider, I refer to these respondents, as well as the partnership Raisin Valley Farms, as "Mr. Horne and partners" unless clarity dictates otherwise.

and for crop year 2003-2004. Furthermore, I found that Mr. Horne and partners violated section 989.80 of the Raisin Order (7 C.F.R. § 989.80) by failing to pay assessments to the RAC for crop year 2002-2003 and for crop year 2003-2004. In total, I found that Mr. Horne and partners committed 673 violations of the Raisin Order. I ordered Mr. Horne and partners to pay to the RAC $6,042.23 in assessments for crop years 2002-2003 and 2003-2004, and $183,006.51 for the dollar equivalent of the California raisins they failed to hold in reserve for crop years 2002-2003 and 2003-2004. Finally, I assessed a civil penalty of $202,600 against Mr. Horne and partners for their violations of the Raisin Order.

On May 12, 2008, the Administrator, Agricultural Marketing Service, United States Department of Agriculture [hereinafter the Administrator], filed Complainant's Petition to Reconsider the Decision and Order of the Judicial Officer [hereinafter the Petition to Reconsider]. In the Petition to Reconsider, the Administrator alleged that the calculation of the assessments owed to the RAC by Mr. Horne and partners, as well as the calculations for the value of the raisins that Mr. Horne and partners failed to hold in reserve are not correct and should be modified. On June 3, 2008, Mr. Horne and partners filed Respondents' Opposition to Plaintiff's [sic] Petition to Reconsider [hereinafter Opposition to Petition to Reconsider]. In their Opposition to Petition to Reconsider, Mr. Horne and partners argue four issues:

1. The Administrator's Petition to Reconsider fails to meet the requirements of section 1.146(a)(3)

of the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary [hereinafter the Rules of Practice] (7 C.F.R. § 1.146(a)(3));

2. The Administrator's suggested calculations cannot be confirmed by resort to the evidence;

3. The proposed reconsideration is inconsistent with the law; and

4. A custom or "toll" packer of raisins does not "acquire" raisins.

The Raisin Order mandates record keeping and reporting requirements that are necessary for the implementation of the Raisin Order (7 C.F.R. §§ 989.73, .77). Without such reports and without access to the documents that support these reports, it is difficult for the Agricultural Marketing Service [hereinafter AMS] and the RAC to properly determine the volume of raisins handled as well as the assessments and other monies due. Mr. Horne and partners failed to provide necessary documents until just before the second portion of the hearing on May 23, 2006.

I have spent considerable time examining the record in this proceeding. It appears that the document universe, entered into the record just prior to the second portion of the hearing, is likely missing some documents, while it contains duplicates of others. Determining exact volumes of raisins that

flowed through Mr. Horne and partners' facility is difficult.

On June 19, 2008, I issued an Order Seeking Clarification in which I ordered the Administrator to explain how he reached the total weights used in calculating the amounts owed by Mr. Horne and partners. On July 11, 2008, the Administrator filed Administrator's Response to the Judicial Officer's Order Seeking Clarification. The response provides guidance for me to use in determining the appropriate amounts owed by Mr. Horne and partners to the RAC for the assessments and for the dollar equivalent of California raisins that Mr. Horne and partners failed to hold in reserve. The Administrator's analysis explained how AMS reached the proposed assessment amounts and the amounts owed for raisins that Mr. Horne and partners failed to hold in reserve. The analysis contained a citation to each relevant exhibit noting the weight of the raisins sold on the invoice in the exhibit.

Finally, on August 4, 2008, Mr. Horne and partners filed Respondents' Submission Opposing the Administrator's Response to an Order Seeking Clarification. This filing was Mr. Horne and partners' opportunity to challenge the Administrator's numbers.

Mr. Horne and partners did not challenge any of the weights or calculations presented in the Administrator's Response to the Judicial Officer's Order Seeking Clarification. Therefore, I find Mr. Horne and partners accept the Administrator's numbers as accurate and waive the opportunity to contest the numbers.

DISCUSSION

As I discussed in my April 11, 2008, Decision and Order, there are three components of the Order that mandate Mr. Horne and partners make monetary payments as a result of their violations of the Raisin Order (Decision and Order at 32-40). First, the Raisin Order requires a handler, who fails to deliver reserve tonnage, to compensate the RAC, as follows:

> **§ 989.166 Reserve tonnage generally.**
>
> . . . .
>
> (c) *Remedy in the event of failure to deliver reserve tonnage raisins.* A handler who fails to deliver to the Committee, upon request, any reserve tonnage raisins in the quantity and quality for which he has become obligated . . . shall compensate the Committee for the amount of the loss resulting from his failure to so deliver.

7 C.F.R. § 989.166(c).

This provision of the Raisin Order leaves me no discretion on the matter and requires that I order Mr. Horne and partners to compensate the RAC for the reserve tonnage raisins they failed to deliver to the RAC. The Raisin Order also instructs me as to how to calculate the compensation owed by Mr. Horne and partners to the RAC.

> **§ 989.166 Reserve tonnage generally.**
>
> . . . .
>
> (c) *Remedy in the event of failure to deliver reserve tonnage raisins.* . . . The amount of compensation for any

> shortage of tonnage shall be determined by multiplying the quantity of reserve raisins not delivered by the latest weighted average price per ton received by producers during the particular crop year for free tonnage raisins of the same varietal type or types[.]

7 C.F.R. § 989.166(c).

Mr. Horne and partners argued in their Opposition to Petition to Reconsider that the Administrator's calculations cannot be confirmed by resort to the evidence (Opposition to Pet. to Reconsider at 2). Mr. Horne and partners' argument has some validity for the 2002-2003 crop year, in that, without additional clarification, the determination of the weight of the raisins handled by Mr. Horne and partners for the 2002-2003 crop year, is difficult. Because of this difficulty, I ordered the Administrator to clarify his calculations of the weight of the raisins. The Administrator's Response to the Judicial Officer's Order Seeking Clarification provides the necessary clarification. Mr. Horne and partners were given the opportunity to respond to the Administrator's clarifications. Mr. Horne and partners filed Respondents' Submission Opposing the Administrator's Response to an Order Seeking Clarification. However, in this submission, Mr. Horne and partners do not challenge the Administrator's numbers and the exhibits that support the numbers. Therefore, I find Mr. Horne and partners accept the Administrator's process for determining the weight of raisins handled as accurate and Mr. Horne and partners waive any

challenge to the Administrator's conclusions regarding the weight of the raisins.

The Administrator did not challenge my findings regarding the weight of the raisins handled by Mr. Horne and partners in the 2003-2004 crop year. Furthermore, Mr. Horne and partners did not challenge the numbers I used in calculating the reserve tonnage for the 2003-2004 crop year. Therefore, I find that the Administrator and Mr. Horne and partners accept, as accurate, the weights used by me in my April 11, 2008, Decision and Order for the 2003-2004 crop year.

The final component necessary for the calculation of the value of the raisins Mr. Horne and partners failed to hold in reserve is the "latest weighted average price per ton received by producers during the particular crop year for free tonnage raisins of the same varietal type or types." (7 C.F.R. § 989.166(c).) In my April 11, 2008, Decision and Order, I used the "producer price" to calculate the reserve payment requirement. The Administrator argues that the appropriate price is the "announced price" found in the January 10, 2003, letter to the RAC from the Raisin Bargaining Association (CX 583). In *Lion Raisins, Inc. v. United States*, 416 F.3d 1356, 1360 (Fed. Cir. 2005), the United States Court of Appeals for the Federal Circuit held that the "market price for free-tonnage raisins, or the field price, is not set by the RAC, but is determined through a private bargaining process carried out between producers' and handlers' bargaining associations." The Administrator's "announced price" (CX 583 at 2) meets the Federal Circuit's definition of market price; therefore, I use the

"announced price" found in the January 10, 2003, letter as the price for calculating the value of the raisins that Mr. Horne and partners failed to hold in reserve.

In the 2002-2003 crop year, Mr. Horne and partners packed out 1,266,924 pounds of raisins (Exhibit B to the Administrator's Response to the Judicial Officer's Order Seeking Clarification). Applying the shrinkage factor of 0.93857 (CX 92 at 6) for weight loss during processing, Mr. Horne and partners received 1,349,844.9769 pounds of raisins in the 2002-2003 crop year. The reserve obligation for the 2002-2003 crop year was 47 percent (CX 88 at 2-3). Mr. Horne and partners' reserve obligation for that crop year was 634,427.1392 pounds (.47 x 1,349,844.9769 = 634,427.1392). The announced price for raisins was $745 per ton (CX 583 at 2-3). Therefore, for the 2002-2003 crop year, Mr. Horne and partners owe $236,324.13 to the RAC for compensation for failing to deliver any reserve raisins to RAC (634,427.1392 pounds divided by 2,000 pounds per ton = 317.2136 tons; 317.2136 tons x $745 per ton equals $236,324.13).

Similarly, for the 2003-2004 crop year, Mr. Horne and partners packed out 1,965,650 pounds of raisins (CX 3-CX 56). These raisins included natural seedless raisins and other varieties. Applying the 2003-2004 shrinkage factor for each variety indicates that Mr. Horne and partners received 2,066,066 pounds of raisins in the 2003-2004 crop year. Of the 2,066,066 pounds of raisins received, 2,037,196 pounds were natural seedless raisins subject to the 30 percent reserve obligation (CX 161). Mr. Borne and partners' reserve obligation for the 2003-2004

crop year was 611,159 pounds (.30 x 2,037,196 = 611,158.8). The announced price for raisins was $810 per ton (CX 583 at 2-3). Therefore, for the 2003-2004 crop year, Mr. Horne and partners owe $247,519.40 to the RAC for compensation for failing to deliver any reserve raisins to the RAC (611,159 pounds divided by 2,000 pounds per ton = 305.5795 tons; 305.5795 tons x $810 per ton equals $247,519.40). The total amount owed to the RAC by Mr. Horne and partners for failing to deliver any reserve raisins to RAC is $483,843.53.

The Raisin Order also requires that each handler contribute to the costs associated with operating the RAC, as follows:

> **§ 989.80 Assessments.**
>
> (a) Each handler shall, with respect to free tonnage acquired by him, . . . pay to the committee, upon demand, his pro rata share of the expenses . . . which the Secretary finds will be incurred, as aforesaid, by the committee during each crop year. . . . Such handler's pro rata share of such expenses shall be equal to the ratio between the total free tonnage acquired by such handler . . . during the applicable crop year and the total free tonnage acquired by all handlers . . . during the same crop year.

7 C.F.R. § 989.80(a). The assessment rate was established at $8 per ton (CX 90).

As noted in this Order Granting Petition to Reconsider, *supra*, for the 2002-2003 crop year, Mr.

Horne and partners received 1,349,844.9769 pounds of natural seedless raisins. The reserve obligation for the 2002-2003 crop year was 47 percent; therefore, the free tonnage was 53 percent (CX 88 at 2). Mr. Horne and partners' free tonnage for natural seedless raisins in that crop year was 715,417.8378 pounds (.53 x 1,349,844.9769 = 715,417.8378). In addition, Mr. Horne and partners received 25,523.0198 pounds of other variety raisins. There was no reserve requirement for those raisins; therefore, all of those other variety raisins were subject to the assessment. Mr. Horne and partners' assessment obligation for the 2002-2003 crop year for natural seedless raisins is $2,861.67 (715,417.8378 pounds divided by 2,000 pounds per ton = 357.7089 tons; 357.7089 tons x $8 per ton = $2,861.67). The assessment obligation for the other varieties is $102.09 (25,523.0198 pounds divided by 2,000 pounds per ton 12.7615; 12.7615 tons x $8 per ton = $102.09). The total assessment owed for the 2002-2003 crop year is $2,963.76.

Mr. Horne and partners received 2,066,066 pounds of raisins in the 2003-2004 crop year. Of the 2,066,066 pounds of raisins received, 2,037,196 pounds were natural seedless raisins subject to the 30 percent reserve obligation (CX 161). The free tonnage of natural seedless raisins was 1,426,037.2 pounds (.70 x 2,037,196 = 1,426,037.2). In addition, there were 28,870 pounds of other varieties which were all free tonnage (2,066,066 - 2,037,196 = 28,870). Thus, the total free tonnage for the 2003-2004 crop year was 1,454,907.2 pounds. At an assessment rate of $8 per ton, Mr. Horne and partners' assessment obligation for the 2003-2004 crop year is $5,819.63 (1,454,037.2 pounds divided by

2,000 pounds per ton 727.4536 tons; 727.4536 tons x $8 per ton = $5,819.63). The total assessment due to the RAC by Mr. Horne and partners for the 2002-2003 crop year and the 2003-2004 crop year is $8,783.39.

The third monetary payment resulting from Mr. Horne and partners' violations of the Raisin Order are civil penalties. The AMAA authorizes civil penalties for violations of marketing orders, such as the Raisin Order, issued under the AMAA.

§ 608c. Orders

. . . .

(14) Violation of order

> . . . .
>
> (B) Any handler subject to an order issued under this section, or any officer, director, agent, or employee of such handler, who violates any provision of such order may be assessed a civil penalty by the Secretary not exceeding $1,000 for each such violation. Each day during which such violation continues shall be deemed a separate violation[.] . . . The Secretary may issue an order assessing a civil penalty under this paragraph only after notice and an opportunity for an agency hearing on the record. Such order shall be treated as a final order reviewable in the district courts of the United States in any district in which the handler subject to the order is an inhabitant, or has the handler's

> principal place of business. The validity of such order may not be reviewed in an action to collect such civil penalty.

7 U.S.C. § 608c(14)(B) (Supp. V 2005).[2]

As neither Mr. Horne and partners nor the Administrator challenged the amount of the civil penalties imposed in my April 11, 2008, Decision and Order, those civil penalties stand. As discussed in my April 11, 2008, Decision and Order, I find Mr. Horne and partners committed the following violations:

- Twenty violations of section 989.73 of the Raisin Order (7 C.F.R. § 989.73) by filing inaccurate reporting forms with the RAC on 20 occasions.

- Fifty-eight violations of section 989.58(d) of the Raisin Order (7 C.F.R. § 989.58(d)) by failing to obtain incoming inspections of raisins on 58 occasions.

- Two violations of section 989.80 of the Raisin Order (7 C.F.R. § 989.80) by failing to pay assessments to the RAC

---

[2] Pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended (28 U.S.C. § 2461 note), the Secretary of Agriculture, by regulation, adjusted the civil monetary penalty that may be assessed under the AMAA (7 U.S.C. § 608c(14)(B)) for each violation of a marketing order, by increasing the maximum civil penalty from $1,000 to $1,100 (7 C.F.R. § 3.91(b)(1)(vii) (2005)).

in crop year 2002-2003 and crop year 2003-2004.

- Five hundred ninety-two violations of sections 989.66 and 989.166 of the Raisin Order (7 C.F.R. §§ 989.66, .166) by failing to hold raisins in reserve and by failing to pay the RAC the dollar equivalent of the raisins not held in reserve.

- One violation of section 989.77 of the Raisin Order (7 C.F.R. § 989.77) by failing to allow AMS to have access to their records.

The appropriate civil penalties for these violations are: (1) $300 per violation for filing inaccurate reporting forms, in violation of 7 C.F.R. § 989.73, for a total of $6,000; (2) $300 per violation for the failure to obtain incoming inspections, in violation of 7 C.F.R. § 989.58(d), for a total of $17,400; (3) $1,000 for the failure to allow access to records, in violation of 7 C.F.R. § 989.77; (4) $300 per violation for the failure to pay the assessments, in violation of 7 C.F.R. § 989.80, for a total of $600; and (5) $300 per violation for the failure to hold raisins in reserve, in violation of 7 C.F.R. §§ 989.66, .166, for a total of $177, 600. The total civil penalties assessed against Mr. Horne and partners for violating the Raisin Order in the 2002-2003 and 2003-2004 crop years is $202,600. I conclude that civil penalties in these amounts are sufficient to deter Mr. Horne and partners from continuing to violate the Raisin Order and will deter others from similar future violations.

Mr. Horne and partners did not seek reconsideration of my April 11, 2008, Decision and Order; however, they did file an Opposition to Petition to Reconsider. In their opposition, Mr. Horne and partners raised four points:

1. that the Administrator's Petition for Reconsideration fails to meet the requirements of section 1.146(a)(3) of the Rules of Practice (7 C.F.R. § 1.146(a)(3));

2. that the Administrator's suggested calculations cannot be confirmed by resort to the evidence;

3. that the proposed reconsideration is inconsistent with the law; and

4. that a custom or "toll" packer of raisins does not "acquire" the raisins.

Mr. Horne and partners argue that the Petition for Reconsideration failed to meet the requirements of section 1.146(a)(3) of the Rules of Practice (7 C.F.R. § 1.146(a)(3)), in that "there is no section of the Petition devoted to a description of errors made." (Opposition to Pet. to Reconsider at 1.) The Rules of Practice do not require a specific format for petitions to reconsider. The only requirement is that the "petition must state specifically the matters claimed to have been erroneously decided and the alleged errors must be briefly stated." (7 C.F.R. § 1.146(a)(3).) The Administrator's Petition to Reconsider clearly meets that requirement. It was

easy to discern, from the Petition to Reconsider, the errors that the Administrator claimed I made in my April 11, 2008, Decision and Order. I find that the Administrator's Petition to Reconsider meets the requirements of the Rules of Practice.

Next, Mr. Horne and partners claim "that the Administrator's suggested calculations cannot be confirmed by resort to the evidence." While I agree that the Administrator's filings do not present the image of clarity — which is why I ordered the Administrator to provide clarification — I found that I was able to follow the transactions identified in Exhibits A and B to the Administrator's Response to the Judicial Officer's Order Seeking Clarification. Therefore, using Exhibits A and B to the Administrator's response, I was able to determine the volume of raisins that flowed through Mr. Horne and partners' facility and the tonnage of raisins that they failed to hold in reserve, as well as the assessments and the payments in lieu of reserve raisins that Mr. Horne and partners owed to the RAC.

Mr. Horne and partners' third point is that "the proposed reconsideration is inconsistent with the law." Mr. Horne and partners are challenging the constitutionality of the Raisin Order. As I discussed in my April 11, 2008, Decision and Order, I have no authority to determine the constitutionality of the various statutes administered by the United States Department of Agriculture. *Califano v. Sanders*, 430 U.S. 99, 109 (1977) ("Constitutional questions obviously are unsuited to resolution in administrative hearing procedures"); *Robinson v. United States*, 718 F.2d 336, 338 (10th Cir. 1983)

("The agency is an inappropriate forum for determining whether its governing statute is constitutional"). Therefore, Mr. Horne and partners' questioning of the constitutionality of the Raisin Order falls on legally deaf ears. I need not point out to Mr. Horne and partners that the Court of Federal Claims recently found the arguments made in this appeal to be unavailing. *Evans v. United States*, 74 Fed. Cl. 554 (2006). The United States Court of Appeals for the Federal Circuit affirmed the Court of Federal Claims Decision, 250 F. App'x 231 (2007), and the Supreme Court of the United States denied a petition for certiorari, 128 S. Ct. 1292 (2008). Until the appropriate court instructs me otherwise, I will treat the Raisin Order as constitutional, as I believe it to be.

As I discussed in my April 11, 2008, Decision and Order, the reference to Farmer-to-Consumer Direct Marketing Act of 1976 (7 U.S.C. §§ 3001-3006) provides Mr. Horne and partners little solace. They argue that it exempts them from handler obligations under the Raisin Order because they were attempting to promote the policy of that statute. The ALJ found this argument "patently specious" and I agree. The Farmer-to-Consumer Direct Marketing Act does not exempt raisin producers from the requirements of the Raisin Order.

Furthermore, the type of activity that the Farmer-to-Consumer Direct Marketing Act sought to encourage was the farmers market where farmer and consumer could come together directly and avoid middlemen. Mr. Horne and partners presented no evidence that their activities, in fact, supported the goals of the Farmer-to-Consumer Direct Marketing

Act. Mr. Horne and partners sold raisins in wholesale packaging and quantities, frequently to candy makers and other food processors as ingredients for other food products. Mr. Horne and partners showed no connection between their business activities and the goals of the Farmer-to-Consumer Direct Marketing Act. Therefore, even if the Farmer-to-Consumer Direct Marketing Act exempted raisin producers from the mandates of the Raisin Order — which it does not — Mr. Horne and partners failed to demonstrate compliance with the goals of the Farmer-to-Consumer Direct Marketing Act.

The final issue raised by Mr. Horne and partners is whether a custom or "toll" packer of raisins "acquires" the raisins, This issue was discussed in my April 11, 2008, Decision and Order. A handler becomes a "first handler" when he "acquires" raisins, a term specifically and plainly defined by the Raisin Order:

§ 989.17 Acquire.

> *Acquire* means to have or obtain physical possession of raisins by a handler at his packing or processing plant or at any other established receiving station operated by him: . . . Provided further, That the term shall apply only to the handler who first acquires the raisins.

7 C.F.R. § 989.17.

The record demonstrates that Mr. Horne and partners, in their operation of the packing house known as Lassen Vineyards, were first handlers who acquired raisins during crop years 2002-2003 and

2003-2004. Mr. Horne and partners' arguments that they did not acquire raisins are unavailing in light of the plain meaning of the language of the Raisin Order defining the term "acquire." Moreover, if there were any ambiguity, the interpretation given by the United States Department of Agriculture, both at the time of the issuance of the Raisin Order and in subsequent correspondence with the Hornes, is clear, straightforward, of long-standing, and controlling. *See Barnhart v. Walton*, 535 U.S. 212 (2002); *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

The 1949 recommended decision regarding the raisin growers' request for the Raisin Order, which was adopted as part of the Secretary of Agriculture's final decision, explained the language employed and clarified that:

> The term "acquire" should mean to obtain possession of raisins by the first handler thereof. The significance of the term "acquire" should be considered in light of the definition of "handler" (and related definitions of "packer" and "processor"), in that the regulatory features of the order would apply to any handler who acquires raisins. Regulation should take place at the point in the marketing channel where a handler first obtains possession of raisins, so that the regulatory provisions of the order concerning the handling of raisins would apply only once to the same raisins. Numerous ways by which handlers might acquire raisins were

> proposed for inclusion in the definition of the term, the objective being to make sure that all raisins coming within the scope of handlers' functions were covered and, conversely, to prevent a way being available whereby a portion of the raisins handled in the area would not be covered. Some of the ways by which a handler might obtain possession of raisins include: (i) Receiving them from producers, dehydrators, or others, whether by purchase, contract, or by arrangement for toll packing, or packing for a cash consideration[.]

14 Fed. Reg. 3083, 3086 (June 8, 1949).

This interpretation is consistent with testimony at the hearing conducted to consider the need of the raisin industry for a marketing order and its appropriate terms:

> Q Mr. Hoak, suppose a packer stems, cleans, and performs other operations connected with the processing of raisins for a producer and then the producer sells the raisins to another packer. Under this proposal, which person should be required to set the raisins aside?
>
> A The man who performs the packing operation, who is the packer.
>
> Q Mr. Hoak, I believe that you have testified earlier that the term "packer" should include a toll packer. By that do you mean that it should include a person

> who takes raisins for someone else for a fee?
>
> A That is right.
>
> Q Also, did I understand you to say that that person should be the one who would be required to set aside or establish the pools under the regulatory provisions?
>
> A That is right. He is the man who would be held responsible for setting aside the required amount of raisins.
>
> Q I take it that that man would not have title to any raisins insofar as he is a toll packer; is that correct?
>
> A That is right.

AU Decision and Order, App. A.

These excerpts from the recommended decision and the hearing transcript were sent to an attorney representing Mr. and Mrs. Horne on April 23, 2001. Apparently, they believe their personal interpretation of the term "acquire" as used in the Raisin Order should take precedence over the plain language of the Raisin Order and the interpretation of its meaning that was conveyed to them by the United States Department of Agriculture. The decision of Mr. Horne and partners not to follow the United States Department of Agriculture's interpretative advice, and, instead, to play a kind of shell game with interlocking partnerships and a marketing association to try to conceal their role as first handler, only shows that they acted willfully and intentionally when they decided not to file accurate reports, not to hold raisins in reserve, not to

have incoming raisins inspected, not to pay assessments, and not to allow inspection of their records for verification purposes.

In simple terms, Mr. Horne and partners, as a matter of law, acquired raisins, as first handlers, when raisins arrived at the processing/packing facility known as Lassen Vineyards. Their arguments that title to the raisins never transferred from the grower to Mr. Horne and partners under California law is unavailing. California law does not control, the Raisin Order does. Under the Raisin Order, the term "acquire" is a term of art that does not encompass an ownership interest but rather physical possession. Mr. Horne and partners obtained physical possession of— thus they "acquired" — raisins when a grower brought raisins to the facility.

For the foregoing reasons, I grant the Administrator's Petition to Reconsider and issue the following Order.

ORDER

1. Marvin D. Horne, Laura R. Horne, Don Durbahn, Lassen Vineyards, a partnership, and Raisin Valley Farms, a partnership, jointly and severally, are assessed a $202,600 civil penalty. The civil penalty shall be paid by certified check or money order made payable to the "Treasurer of the United States" and sent to:

Frank Martin, Jr.
United States Department of Agriculture
Office of the General Counsel
Marketing Division
Room 2343-South Building
Washington, DC 20250-1417

Payment of the civil penalty shall be sent to Mr. Martin within 100 days after this Order becomes effective.

2. Marvin D. Horne, Laura R. Horne, Don Durbahn, Lassen Vineyards, a partnership, and Raisin Valley Farms, a partnership, jointly and severally, are ordered to pay to the RAC $8,783.39 in assessments for crop years 2002-2003 and 2003-2004, and $483,843.53 for the dollar equivalent of the California raisins they failed to hold in reserve for crop years 2002-2003 and 2003-2004. Payments of the $8,783.39 for owed assessments and of the $483,843.53 for the dollar equivalent of the California raisins that were not held in reserve shall be sent to the RAC within 100 days after this Order becomes effective.

3. This Order shall become effective on the day after service on Marvin D. Horne, Laura R. Horne, Don Durbahn, Lassen Vineyards, a partnership, and Raisin Valley Farms, a partnership.

RIGHT TO JUDICIAL REVIEW

Marvin D. Horne, Laura R. Horne, Don Durbahn, Lassen Vineyards, a partnership, and Raisin Valley Farms, a partnership, have the right to obtain review of the Order in this Order Granting Petition To Reconsider in any district court of the United States in which they are inhabitants or have their principal place of business.[3]

Done at Washington, DC

September 18, 2008

/s/ William G. Jenson

William G. Jenson
Judicial Officer

---

[3] 7 U.S.C. § 608(14)(B).

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

MARVIN D. HORNE and LAURA R. HORNE, d.b.a. RAISIN VALLEY FARMS and RAISIN VALLEY FARMS MARKETING ASSOCIATION; MARVIN D. HORNE; LAURA R. HORNE; DON DURBAHN; and the ESTATE of RENA DURBAHN, d.b.a. LASSEN VINEYARDS,
Plaintiffs,
v.
UNITED STATES DEPARTMENT OF AGRICULTURE, Defendant.

CASE NO. CV–F–08–1549 LJO SMS. | Dec. 11, 2009.

ORDER ON CROSS MOTIONS FOR SUMMARY JUDGMENT (Docs. 24, 26)

I. INTRODUCTION

Plaintiffs appeal an administrative decision of a defendant United States Department of Agriculture ("USDA") Judicial Officer ("JO") that imposed civil penalties and assessments for Plaintiffs' alleged violation of various provisions of the Agricultural Marketing Agreement Act of 1937, as amended, 7 U.S.C. § 601 et seq. ("AMAA") and the order regulating the Handling of Raisins Produced from Raisin Variety Grapes Grown in California, 7 C.F.R. Part 989 ("Marketing Order"). This appeal presents four issues on cross motions for summary judgment:

First, this Court considers Plaintiffs' challenge to the JO's opinion that Plaintiffs are "handlers" who "acquired" raisins and were therefore subject to the Marketing Order. Second, the Court considers whether the penalties imposed by the JO violate the Excessive Fines Clause of the Eighth Amendment to the United States Constitution. Third, the Court is asked to decide whether the Marketing Order's reserve requirement violates the Due Process Clause of the Fifth Amendment to the United States Constitution as a physical taking of Plaintiffs' property without just compensation. Finally, this Court determines whether the JO's decision to dismiss Plaintiffs' administrative petition was arbitrary, capricious, an abuse of discretion, and contrary to the law. Having read and reviewed the parties' arguments, and considering the administrative record and the applicable case law, this Court GRANTS summary judgment in favor of defendant USDA and against Plaintiffs.

II. BACKGROUND

A. Legal Framework

"The AMAA was originally enacted during the Depression, with the objective of helping farmers obtain a fair value for their agricultural products." *Lion Raisins, Inc. v. U.S.*, 416 F.3d 1356, 1358 (Fed. Cir. 2005) (*"Lion II"*), *citing Pescosolido v. Block*, 765 F.2d 827, 828 (9th Cir. 1985); 7 U.S.C. § 602 (2000). The AMAA "contemplates a cooperative venture among the Secretary [of Agriculture], handlers, and producers the principal purposes of which are to raise the price of agricultural products and to establish an orderly system for marketing them."

Block v. Cmty. Nutrition Inst., 467 U.S. 340, 346 (1984). To accomplish this, the AMAA delegates authority to the Secretary of Agriculture to issue marketing orders regulating the sale and delivery of various commodities, including raisins. The Marketing Order was created in an effort to limit the supply of raisins on the open market, and thus, to stabilize prices. *See* 7 U.S.C. §§ 608c (1), (2), (6)(C).

The Marketing Order does not regulate raisin producers (i.e., growers, farmers). Instead, "handlers" of California raisins are subject to the requirements of the Marketing Order, 7 C.F.R. § 981.1 et seq. Handlers who acquire raisins are required, inter alia, to: (1) obtain USDA inspections of raisins acquired or received from growers, 7 C.F.R. § 989.58(d); (2) file accurate reports with the USDA's Raisin Administrative Committee ("RAC"), 7 C.F.R. § 989.73; and (3) allow access to records to verify the accuracy of the reports filed with the RAC. 7 C.F.R. § 989.77. The USDA may obtain injunctive relief, civil penalties, and criminal penalties against handlers who fail to comply with the regulatory provisions of the Marketing Order. 7 U.S.C. §§ 608a(5), 608a(6), 608c(14).

The Marketing Order creates the RAC, a raisin industry group responsible for the administration of the Marketing Order. The RAC is composed of forty-seven members who represent different groups in the raisin industry, including thirty-five producers, ten handlers, one cooperative bargaining association, and one member of the public. The RAC is an agent of the federal government. Members of the RAC are nominated by the industry groups and appointed by the Secretary of Agriculture. 7 C.F.R. §§ 989.26, .29,

.30. The RAC receives no federal appropriations. To fund the RAC, handlers must pay an $8 per ton assessment for free tonnage raisins. 7 C.F.R. § 989.90. The assessments pay for approximately 50% of the administration costs of the RAC. 7 C.F.R. §§ 989.53, 989.79, 989.80(a), 989.82.

The Marketing Order is designed "to prevent over-production of agricultural products and excessive competition in marketing them, with price stabilization as the ultimate objective." *Parker v. Brown*, 317 U.S. 341, 368 (1943). To accomplish this goal, and as an additional way to fund the RAC, the Marketing Order contains a reserve requirement. The Marketing Order reserve requirement requires handlers to separate the raisins they receive or acquire from producers into "reserve tonnage" raisins for the benefit of the RAC and "free tonnage" raisins. Handlers may sell the free tonnage raisins on the open markets. The reserve tonnage is determined each year as a portion of the raisins that handlers buy from producers. Handlers are required to transfer the reserve tonnage to the RAC. 7 C.F.R. § 989.66, 989.166. While raisin producers hold an equity interest in the reserve tonnage, the RAC may sell or dispose of the reserve raisins in secondary, non-competitive markets. The RAC uses some of the proceeds to fund its administration. The RAC pays to the producers any net proceeds remaining after it has disposed of the crop year's reserve raisins. It generally takes a few years for the RAC to dispose of a crop year's reserve tonnage raisins.

B. Plaintiffs' alleged activities

Marvin D. Horne ("Mr. Horne") has been a raisin farmer since 1969. Administrative Record ("AR")

1646. Mr. Horne and his wife, Laura R. Horne ("Ms. Horne") (collectively "the Hornes") produce raisins under the name of Raisin Valley Farms. *Id.* AR 1646, 1732. Raisin Valley Farms is a California general partnership, with the Hornes as partners. The Raisin Valley Farms name was registered in 1999.

Mr. Horne determined to sell his Raisin Valley Farms raisins without the use of a packer or handler, because he felt that the packers and the RAC "were stealing [his] crop." AR 1676. Mr. Horne consulted with many people, including attorneys, university professors, and officials, in an attempt to create a way to market his raisins without the use of the raisin packer system. Mr. Horne also exchanged several letters with the USDA in an effort to determine how he could market his raisins without becoming subject to the Marketing Order, as discussed in the relevant sections below. The focus of this action relates to the Hornes' activities during the 2002–2003 and 2003–2004 crop years,[4] when the Hornes implemented their plan to market raisins outside of the bounds of the Marketing Order.

Mr. Horne, a former alternate member of the RAC, became a vocal opponent of the Marketing Order. AR 954. Mr. Horne wrote multiple letters to the Secretary of Agriculture and to the RAC to complain about the Marketing Order. AR 6343–44; AR 2423. On April 23, 2002, the Hornes sent a letter to the Secretary of Agriculture and to the RAC asserting that they were registering as a handler "under protest" because:

---

[4] The crop year for raisins begins on August 1 and ends on July 31 of the following year.

> we are growers that will pack and market our raisins. We reserve our rights under the Constitution of the United States. . . . [T]he Marketing Order Regulating Raisins has become a tool for grower bankruptcy, poverty, and involuntary servitude. The Marketing Order Regulating Raisins is a complete failure for growers, handlers, and the USDA. . . . [W]e will not relinquish ownership of our crop. We put forth the money and effort to grow it, not the Raisin Administrative Committee. This is America, not a communist state.

AR 2423. Thereafter, the USDA issued Plaintiffs handler number 94–101 in 2002.

In addition to growing raisins through Raisin Valley Farms, the Hornes entered into a partnership with Ms. Horne's parents, Don Durbahn ("Mr. Durbahn") and Rena Durbahn (collectively, "the Durbahns"), to create Lassen Vineyards. AR 1647–1850, 5550. Lassen Vineyards is a California general partnership between the Hornes and the Durbahns. Lassen Vineyards grows grapes and produces raisins. In addition to its grape growing activities, Lassen Vineyards purchased equipment to clean, stem, sort, and package raisins in 2001.

The Lassen Vineyards raisin packing equipment and facilities were located on land owned by Lassen Vineyards. Mr. Durbahn oversaw the Lassen Vineyard raisin packing plant. Mr. Horne's son, Marvin Horne, Jr. ("Marvin") was the plant manager. The equipment at the plant operated by Lassen Vineyards cleaned, stemmed, sorted, and

packaged raisins throughout the 2002–2003 and 2003–2004 crop years. During this time, Lassen Vineyards packed Raisin Valley Farms and Lassen Vineyards raisins, and packed other farmer's raisins for a fee.

Raisins that were packed at Lassen Vineyards' plant were marketed and sold to wholesale customers by Raisin Valley Farms Marketing Association, an unincorporated association organized and operated by the Hornes ("Raisin Valley Marketing"), during crop years 2002–2003 and 2003–2004. AR 1652, 1996–97, 2117. Over 60 raisin growers joined Raisin Valley Marketing to gain volume selling power. Grower members of Raisin Valley Marketing sent their raisins to Lassen Vineyards' plant to be cleaned, stemmed, sorted, and packaged. According to Plaintiffs, Raisin Valley Marketing sold raisins on behalf of its members, while the growers maintained ownership. According to Mr. Horne, Raisin Valley Marketing held grower sales funds in a trust account, paid Lassen Vineyards for the use of their equipment, paid a third party broker fee, and distributed the net proceeds to the growers.

Lassen Vineyards charged a fee to Raisin Valley Marketing members, typically twelve cents per pound, to pack California raisins at the plant. Lassen Vineyards charged these growers an additional five dollars per pallet for raisins that were boxed and stacked. AR 1940–41, 1957. The packing fee covered the cost of the labor and packaging materials. AR 1942–44. The workers who operated the equipment were "leased" to Lassen Vineyards by Ms. Horne and Ms. Durbahn. AR 1710. The Lassen Vineyards

packing operation was supervised on a daily basis by Mr. Durbahn and Marvin, whose wages were paid by Lassen Vineyards. AR 1948–49.

Plaintiffs contend that during the 2002–2003 and 2003–2004 crop years: Lassen Vineyards was a "leasing company" that "rented" the equipment to other growers to clean, stem, and sort their own raisins and "leased" employees of the plant who operated the machinery; Mr. Durbahn did not process raisins as a handler, he oversaw the operation of a leased plant; Marvin managed the leased equipment; growers leasing the equipment from the Lassen Vineyards plant were assigned lot numbers to preserve the identity of their product; Lassen Vineyards never stored, purchased, controlled, acquired, or handled raisins; growers using the facilities engaged in the cleaning, stemming, sorting, grading, and packing function through leased employees and equipment; and lessees maintained right, title, ownership, and control of the raisins until they were sold to the consumer market. Plaintiffs maintain that they were exempt from the Marketing Order during the 2002–2003 and 2003–2004 crop years, because they were raisin growers, never acquired raisins, and were working within the Farmers to Consumers Direct Marketing Act.

In his testimony, Mr. Horne admitted that both Lassen Vineyards and Raisin Valley Farms acted as "packers" under the Marketing Order during the 2002–2003 and 2003–2004 crop years. AR 1761–62. Mr. Horne admitted that Raisin Valley Farms did not pay assessments, did not have incoming inspections performed, did not hold raisins in

reserve, and did not report acquisitions of raisins during the 2002–2003 and 2003–2004 crop years. AR 1743–45. When asked whether he held raisins in reserve, Mr. Horne replied, "No. They're my raisins." AR 1743. He admitted that his reports to the RAC disclosed "zero acquisitions." AR 1744.

Mr. Horne admitted that for crop years 2002–2003 and 2003–2004, Lassen Vineyards operated a packing house on land with equipment owned jointly by the Hornes and the Durbahns. AR 1685. Mr. Horne further admitted that Lassen Vineyards did not pay assessments, did not have incoming inspections performed, did not hold raisins in reserve, and did not report acquisitions of raisins during the 2002–2003 and 2003–2004 crop years, because "they're not acquired raisins." AR 1747–51.

The USDA performed outgoing inspections on the raisins packed at Lassen Vineyards. AR 1745, 1747–48. During the hearing, the USDA introduced evidence that Lassen Vineyards packed out more than 1.2 million pounds of raisins during the 2002–2003 crop year and more than 1.9 million pounds of raisins for the 2003–2004 crop year. AR 740–51, 2186–2304, AR 2602–5512.

C. Administrator's Proceedings against Plaintiffs

On April 1, 2004, AJ Yates, Administrator of the Agriculture of the Agriculture Marketing Service ("administrator") filed a complaint before the Secretary of Agriculture against the Hornes, d.b.a. Raisin Valley Farms (collectively referred to as "Raisin Valley Farms"). AR 1–5. The administrator's complaint alleged that Raisin Valley Farms was

"engaged in the business as 'handler' of California raisins" during the 2002–2003 and 2003–2004 crop years. AR 1. The administrator alleged that Raisin Valley Farms violated the AMAA and the Marketing Order by submitting inaccurate forms to the RAC, failing to hold inspections of incoming raisins, failing to hold raisins in reserve, failing to pay assessments, and failing to allow access to records. The administrator filed an amended complaint on October 25, 2004.

Raisin Valley Farms denied the allegations. In addition, Raisin Valley Farms filed an amended answer on January 21, 2005 asserting various affirmative defenses, including that the AMAA and the Marketing Order are unconstitutional; Raisin Valley Farms is not a handler and did not acquire physical possession of raisins within the meaning of the regulations; Raisin Valley Farms did not handle or acquire raisins of third-party producers that processed their raisins through equipment owned by Lassen Vineyards; and Raisin Valley Farms was not required to comply with the reporting, incoming inspection, and other requirements alleged in the amended complaint. AR 82–88.

A hearing on the administrator's action took place in front of the administrative law judge ("ALJ") between February 9–11, 2005. At the February 2005 hearing, Mr. Horne testified. After the hearing, and to conform the complaint to the evidence presented at the February 2005 hearing, the administrator moved to amend the complaint to include Raisin Valley Marketing and the Hornes and the Durbahns, doing business as Lassen Vineyards (collectively referred to as "Lassen Vineyards") as parties to the

administrative proceedings.[5] The ALJ granted the administrator's opposed motion to amend, and the second amended complaint was filed on August 10, 2005. Thereafter, a second hearing took place on May 23, 2006.

On November 1, 2006, the ALJ issued a decision and order finding that the Hornes and the Durbahns, "acting together as partners doing business as Lassen Vineyards" acted as first handlers of raisins and were subject to the Marketing Order. The ALJ found that Lassen Vineyards violated the AMAA and the Marketing Order, and ordered Lassen Vineyards (the Hornes and Mr. Durbahn), to pay the following, jointly and severally: (1) $731,500 in civil penalties; (2) $9,389.73 in assessments; and (3) $523,037 as the dollar equivalent of the raisins that Lassen Vineyards failed to hold in reserve.

Plaintiffs appealed the ALJ's decision to the JO on January 4, 2007. In its April 11, 2007 Decision and Order ("Initial Decision"), the JO found that Raisin Valley Farms *and* Lassen Vineyards committed the following violations of the Marketing Order:

> 1. Twenty violations of 7 C.F.R. 989.73 for filing inaccurate reporting forms to the RAC;
>
> 2. Fifty-eight violations of 7 C.F.R. § 989.58(d) for failure to obtain incoming inspections;

---

[5] Ms. Durbahn died after the initial administrative action was filed but before Lassen Vineyards was added as a party to the administrative complaint. It is unclear from the record whether the Estate of Rena Durbahn was added as a party to the administrative proceedings, although the Estate of Rena Durbahn is a plaintiff in this action.

3. Two violations of 7 C.F.R. § 989.66 for failure to hold reserve raisins for crop year 2002–2003 and 2003–2004;

4. Two violations of 7 C.F.R. § 989.80 for failure to pay assessments to the RAC; and

5. One violation of 7 C.F.R. § 989.77 for failure to allow the Agricultural Marketing Service to have access to the records.

AR 665–706. The administrator sought reconsideration of the JO's Initial Decision, challenging the JO's calculations of the civil penalties and assessments. In its Order Granting Petition to Reconsider, issued September 18, 2008 ("Reconsideration Order"), the JO imposed the following penalties against Lassen Vineyards and Raisin Valley Farms, jointly and severally:

1. $202,600.00 as a civil penalty;

2. $8,783.39 in assessments for the 2002–2003 and 2003–2004 crop years; and

3. $483,843.53 for the alleged dollar equivalent of the California raisins Plaintiffs failed to hold in reserve for the 2002–2003 and 2003–2004 crop years.

AR 757–778.

D. Plaintiffs' Administrative Petition Against USDA

Plaintiffs filed an administrative petition on March 5, 2007 to challenge various Marketing Order regulations. Plaintiffs filed their administrative

petition pursuant to 7 U.S.C. § 608c(15)(A), a procedure created by the AMAA that expressly provides *handlers* an administrative procedure to challenge the Marketing Order. *See United Dairyman of Ariz. v. Veneman*, 279 F.3d 1160, 1164 (9th Cir. 2002). In moving to dismiss Plaintiffs' petition, the USDA argued, among other things, that since Plaintiffs did not admit that they were handlers during the time period in question, they had no jurisdiction to file an administrative petition as handlers. The ALJ denied the USDA's motion to dismiss, reasoning that because the USDA investigated Plaintiffs, determined Plaintiffs were handlers, and initiated proceedings against Plaintiffs to establish they were handlers, Plaintiffs had jurisdiction to file an administrative petition pursuant to 7 U.S.C. § 608c(15)(A). The administrator appealed the ALJ's denial of its motion to dismiss. On February 4, 2008, the JO agreed with the administrator to rule that Plaintiffs lacked jurisdiction to file an administrative petition pursuant to 7 U.S.C. § 608c(15)(A).

On March 18, 2008, forty-three days after the JO's decision, Plaintiffs initiated an action in this Court to appeal the JO's decision. *Horne v. USDA*, CV–08–402 OWW SMS. The USDA moved to dismiss for lack of subject matter jurisdiction. On November 13, 2008, Judge Oliver W. Wanger granted the USDA's motion to dismiss, finding that Plaintiffs' appeal was untimely pursuant 7 U.S.C. § 608c(15)(B). Plaintiffs appealed Judge Wanger's decision to the Ninth Circuit Court of Appeals. That appeal remains pending.

E. Procedural History

On October 14, 2008, Plaintiffs[6] filed their complaint in this Court seeking declaration relief and review of the USDA's decision pursuant to 7 U.S.C. § 608c(14)(B). Plaintiffs moved for summary judgment on August 28, 2009. The USDA moved for summary judgment on October 6, 2009. Plaintiffs opposed the USDA's motion on November 3, 2009. The USDA opposed Plaintiffs' motion on November 19, 2009. As no party requested oral argument, this Court vacated the December 4, 2009 hearing by minute order on November 30, 2009.

III. Standard of Review

Plaintiffs challenge the JO's Initial Decision and Reconsideration Order pursuant to the Administrative Procedures Act ("APA"), 5 U.S.C. § 706(2)(A). When reviewing an order under the APA, "[j]udicial review of an agency decision is narrow." *Balice v. USDA*, 203 F.3d 684, 689 (9th Cir. 2000). This Court may not weigh the evidence and

---

[6] Plaintiffs are the Hornes, d.b.a. Raisin Valley Farms; the Hornes' unincorporated association Raisin Valley Marketing; and the Hornes, Mr. Durbahn, and the Estate of Rena Durbahn, d.b.a. Lassen Vineyards. Although the JO's orders affect the Hornes, Mr. Durbahn, Lassen Vineyards, and Raisin Valley Farms, all plaintiffs collectively assert their arguments against the JO's orders. Accordingly, when referring to Plaintiffs' arguments, this Court's use of the term "Plaintiffs" refers to all of the named plaintiffs. When referring to "Plaintiffs" with regard to the JO's orders, the term "Plaintiffs" refers only to those plaintiffs affected by the JO's orders. To avoid confusion, this Court will use specific plaintiff names where practicable.

substitute its own findings for those of the agency. *Id.* According to the statute, this Court may set aside an agency decision only when it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). An agency does not act in an arbitrary and capricious manner when it presents a "rational connection between the facts found and the conclusions made." *Nat'l Wildlife Fed'n v. U.S. Army Corps of Eng'rs*, 384 F.3d 1163, 1170 (9th Cir. 2004).

In an action for judicial review of an administrative decision, the burdens of persuasion and proof rest with the party challenging the ALJ's or JO's decision. *Clyde K. v. Puyallup Sch. Dist., No. 3*, 35 F.3d 1396, 1399 (9th Cir. 1994), *superceded on other grounds by statute, as recognized in M.L. v. Federal Way Sch. Distr.*, 341 F.3d 1052 n. 7 (9th Cir. 2003); *see also, Sorenson Communications, Inc. v. F.C.C.*, 567 F.3d 1215 (10th Cir. 2009) (in APA challenge of agency decision, burden is on petitioner to establish the action is arbitrary and capricious); *Transportation Workers Union of America, AFL–CIO v. Transportation Sec. Admin.*, 492 F.3d 471 (D.C. Cir. 2007) (on petition for review of order of administrative agency, petitioner bears the burden of production on appeal and must support each element of its claim to challenge order by affidavit or other evidence); *Save Our Heritage, Inc. v. F.A.A.*, 269 F.3d 49 (1st Cir. 2001) (those who assail an agency's findings or reasoning have the burden to identify the defects in evidence and the faults in reasoning.).

The APA authorizes this Court to set aside factual findings only if they are "unsupported by substantial evidence." 5 U.S.C. § 706(2)(E); *Armstrong v. Comm'r*

of Soc. Sec. Admin., 160 F.3d 587, 589 (9th Cir. 1998); *Balice*, 203 F.3d at 689. Substantial evidence "does not mean a large or considerable amount of evidence, but rather 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" *Pierce v. Underwood*, 487 U.S. 552, 565 (1988) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). "Substantial evidence is more than a scintilla but less than a preponderance." *Tidwell v. Apfel*, 161 F.3d 599, 601 (9th Cir. 1999). If the record supports more than one rational interpretation of the evidence, the Court will defer to the administrative officer's decision. *Bayliss v. Barnhart*, 427 F.3d 1211, 1214 n. 1 (9th Cir. 2005). Thus, in its review of a JO decision, the Court will not substitute its judgment for that of the agency. *Marsh v. Oregon Natural Res. Council*, 490 U.S. 360, 378 (1989).

IV. DISCUSSION

A. Whether Plaintiffs are "handlers" who "acquired" raisins and are therefore subject to the Raisin Order

The JO found that Lassen Vineyards and Raisin Valley Farms were handlers who acquired raisins and, therefore, were subject to the Marketing Order during the 2002–2003 and 2003–2004 crop years. The JO further found that Lassen Vineyards and Raisin Valley Farms violated numerous provisions of the AMAA and Marketing Order. The parties do not dispute that a handler that acquires raisins is required to obtain incoming inspections, hold the designated amount in reserve, file reports with the RAC, allow access to records to verify the accuracy of

the reports, and pay assessments to the RAC. 7 C.F.R. §§ 989.58(d); 989.66; 989.166; 989.73; 989.77; and 989.90.

In this challenge to the JO's decision, Plaintiffs advance multiple theories that they were either not subject to the Marketing Order or qualified for an exemption. First, Plaintiffs claim that they were not subject to the Marketing Order because they were not handlers. Second, Plaintiffs contend that they were not subject to the Marketing Order because they did not acquire raisins. Third, Plaintiffs assert that prior USDA opinion letters to Plaintiffs support Plaintiffs' position that they would not be subject to the Marketing Order for their activities. Fourth, Plaintiffs argue that there is no evidence that any plaintiff was a handler. Fifth, Plaintiffs assert that the Marketing Order does not apply to lessors of packing equipment. Sixth, Plaintiffs argue that as raisin growers they were exempt from the Marketing Order. Seventh, Plaintiffs argue that the Farmer to Consumer Direct Marketing Act creates an applicable exemption to the Marketing Order. The Court considers, and ultimately rejects, each of Plaintiffs' arguments below.

1. Plaintiffs were "handlers"

Plaintiffs contend that the JO erred to conclude that they were handlers, because the substantial evidence demonstrates that they are raisin growers, not raisin handlers. A "handler" is:

> (a) any processor or packer; (b) any person who places, ships, or continues natural conditioned raisins in the current of commerce from within the

> area to any point outside thereof; (c) any person who delivers off-grade raisins, other failing raisins or raisin residual material to other than a packer or other than into any eligible non-normal outlet; or (d) any person who blends raisins [subject to certain exceptions].

7 C.F.R. § 989.15. According to this definition, an entity is a handler if it is a packer. A "packer" is:

> any person who, within [California], stems, sorts, cleans, or seeds raisins, grades stemmed raisins, or packages raisins for market as raisins: *Provided, That:* (a) No producer with respect to the raisins produced by him, and no group of producers with respect to raisins produced by the producers comprising the group, and not otherwise a packer, shall be deemed a packer if he or it sorts or cleans (with or without water) such raisins in their unstemmed form;

7 C.F.R. § 989.14 (emphasis in original). Thus, if Plaintiffs engaged in stemming, sorting, cleaning, seeding, grading, or packaging of raisins within California, they were "handlers" pursuant to the Marketing Order. Plaintiffs may also be handlers if they "place natural conditioned raisins in the current of commerce." 7 C.F.R. 989. § 15.

The evidence establishes that Lassen Vineyards stemmed, sorted, cleaned and packaged raisins. Thus, pursuant to 7 C.F.R. § 989.14, Lassen Vineyards was a handler of raisins. Substantial

evidence further establishes that Raisin Valley Farms contributed to the packing of raisins at the Lassen Vineyards plant, as discussed more fully below. Moreover, substantial evidence shows that Raisin Valley Farms placed raisins in the stream of interstate commerce. Accordingly, Raisin Valley Farms was a handler.

Plaintiffs argue, however, that as raisin producers, both Lassen Vineyards and Raisin Valley Farms are exempt from the definition of packer. Plaintiffs correctly point out that according to the definition, "[n]o producer with respect to the raisins produced by him . . . shall be deemed a packer if he or it sorts or cleans . . . such raisins in their unstemmed form." 7 C.F.R. § 989.14. Plaintiffs fail to demonstrate, however, that Lassen Vineyards or Raisin Valley Farms sorted or cleaned their raisins in an *unstemmed* form. The substantial evidence introduced by the USDA at the administrative hearing supports the JO's conclusion that Lassen Vineyards stemmed the raisins in addition to the other packing activities. In addition, Plaintiffs concede that the definition of handler within the Marketing Order "captured within its scope any producer who seeds, grades, packages, or stems raisins or places raisins into interstate commerce." Pl. Mem., 15 (referencing 7 C.F.R. §§ 989.14, 989.15). Accordingly, this exemption is inapplicable to Plaintiffs. Because the substantial evidence demonstrates that Plaintiffs engaged in stemming, sorting, cleaning, seeding, grading, or packaging of raisins within California, they were "handlers" pursuant, and subject, to the Marketing Order.

2. Plaintiffs "acquired" raisins

Plaintiffs contend that there is no evidence that they "acquired" raisins. Plaintiffs argue that the USDA "failed to produce any evidence of a single seller, or buyer, or evidence of consideration or of title transfer. It failed to prove a sale of goods as is required for a simple, ordinary case governed by the Uniform Commercial Code, and it offered no proof of any acquisition." Plaintiffs construe the term "acquire" to require a purchase and sale of goods as demonstrated by the transfer of title.

This Court agrees with the JO that Plaintiffs "arguments that they did not acquire raisins are unavailing in light of the plain meaning of the language of the Raisin Order defining the term." AR 773. The Marketing Order defines "acquire" in the following way:

> "Acquire" means to have or obtain physical possession of raisins by a handler at his packing or processing plant or at any other established receiving station, operated by him: provided that a handler shall not be deemed to acquire raisins (including raisins produced or dehydrated by him) while: (a) he stores them for another person or as a handler-produced tonnage in compliance with the provisions of 989.58 & 989.70; (b) he reconditions them, or; (c) he has them in his possession for the purpose of inspection, and provided further, that the term shall apply only to the handler who first

acquires the raisins.

7 C.F.R. § 989.17. This definition is not ambiguous. Plaintiffs "acquire" raisins if they "obtain physical possession of raisins . . . at [the] packing or processing plant . . . operated by [them]." The definition cannot be interpreted reasonably to required a sale of goods under the UCC, as Plaintiffs argue. The plain and unambiguous definition of "acquire" requires "physical possession" at a packing facility; it does not require the transfer of legal title.

Reasonable inferences made from substantial evidence support the JO's conclusion that Plaintiffs acquired raisins. The JO noted: "The record does not contain direct evidence that Mr. Horne and partners 'received' raisins but there is ample evidence that they 'packed-out' raisins (CX 82–CX 87). Logic allows me to conclude that raisins cannot be 'packed-out' unless they are received." AR 677, n.4. Under the same sound logic, this Court finds that substantial evidence supports the JO's finding that Plaintiffs acquired raisins during the 2002–2003 and 2003–2004 crop years. The uncontroverted evidence demonstrates that Plaintiffs stemmed, sorted, cleaned and packaged raisins at Lassen Vineyard's plant. During the hearing, the USDA introduced evidence that Plaintiffs, in their operation of Lassen Vineyards and using Raisin Valley Farms' handler number stamp, "packed out" more than 1.2 million pounds of raisins during the 2002–2003 crop year and more than 1.9 million pounds of raisins for the 2003–2004 crop year. This evidence supports the logical conclusion that Plaintiffs has physical possession of, and thus acquired, those raisins that they handled and packed out at Lassen Vineyards.

3. USDA Opinion Letters were Consistent with the JO's Decision

Plaintiffs contend that an April 23, 2001 letter from Robert Keeney of USDA–AMS Fruit and Vegetable Programs ("Keeney Letter") "should be dispositive of this case." The Keeney Letter reads:

> In your letter, you indicated that Raisin Valley Farms has entered into an agreement with Del Rey Packing Company (Del Rey) whereby Del Rey will "custom pack" all of Raisin Valley's organic raisin crop. Del Rey will perform "packer" functions on Raisin Valley Farms' raisins such as stemming, sorting, and seeding. Del Rey will also ensure that the raisins are inspected but will not take title to the raisins . . .
>
> [I]n this situation you described, you are correct that Raisin Valley Farms would be neither a packer nor a handler under the order.

AR 6316–17. Plaintiffs interpret this letter to opine that Raisin Valley Farms would not be a handler in the situation where Raisin Valley Farms uses a custom packer to pack its raisins, and would not be a handler under facts of this action. Plaintiffs argue that the USDA "cannot have it both ways, and be situational about when it will, and will not, treat one of the Respondents as a 'handler' or 'packer.'"

The USDA points out that Plaintiffs "omit any mention of the critical part of the [Keeney] letter and

misconstrue entirely its importance in this case." The Keeney Letter was a response to a March 15, 2001 letter that Plaintiffs wrote to the USDA in which Plaintiffs advised the USDA that "Raisin Valley Farms has entered into an arrangement whereby Del Rey Packing will 'custom pack' in 50 pound boxes the certified 100% organic raisin crop produced by Raisin Valley Farms." AR 6316–17. Plaintiffs further informed the USDA in their letter that:

> Raisin Valley Farms will not stem, sort, seed, or grade its organic raisin crop. That will be accomplished pursuant to the "custom packing" arrangement entered into between Raisin Valley Farms and Del Ray Packing. . . . Del Rey Packing will not take title, will not place any of Raisin Valley Farms' raisins in its inventory, and will not sell any portion of Raisin Valley Farms' organic raisin crop. It will merely "custom pack" on behalf of Raisin Valley Farms. As such, Raisin Valley Farms does not fall within the definition of a "packer" under ... the Raisin Marketing Order.

Id. Plaintiffs asked the USDA to "advise if your interpretation of . . . the . . . Marketing Order is inconsistent with the intent of the marketing program as interpreted by Raisin Valley Farms." *Id.* The Keeney Letter was written in response to Plaintiffs' March 2001 letter to address the hypothetical situation therein described. And while the Keeney Letter opines that Raisin Valley Farms would not be handler or packer under that

hypothetical situation, Plaintiffs omit the following key passage:

> Rather, Del Rey would be a packer and handler. Del Rey would acquire Raisin Valley Farms' raisins, and would further be required to meet the order's obligations regarding volume regulation, quality control, payment of assessments to the Raisin Administrative Committee (RAC), and reporting requirements.

AR 6316–17.

From this letter exchange, three points emerge. First, the USDA made clear that it would consider a custom or toll packer to be a handler that would be required to fulfill the Marketing Order obligations. The evidence supports, and Plaintiffs do not deny, that Lassen Vineyards performed "packer" functions on Raisin Valley Farms' raisins, such as stemming, sorting, and seeding. Thus, the USDA's opinion in the Keeney Letter is consistent with the JO's opinion; to wit, an entity that custom packs raisins is a handler and has a duty to meet the obligations under the Marketing Order.

Second, the Keeney Letter informed Plaintiffs that transfer of title was irrelevant to whether the custom packer was considered to be a handler under the Marketing Order. In their letter, Plaintiffs proposed that Del Rey will not place any of Raisin Valley Farms' raisins in its inventory, will not sell any portion of Raisin Valley Farms' organic raisin crop, and will not take title. Plaintiffs proposed that Del Rey would merely "custom pack" on behalf of Raisin Valley Farms. Under this scenario, the Keeney

Letter concluded that Del Rey would be a packer and handler subject to the provisions of the Marketing Order. Thus, Plaintiffs were on notice since 2001 that a packer acquires raisins even if there is no transfer of title.[7]

Third, Plaintiff's reliance on this hypothetical scenario is inapposite, because it describes a situation that is incongruent with the evidence. Plaintiffs hypothesized a situation in which they would perform none of the handler or packer functions. Instead, Raisin Valley Farms would pay an unrelated third-party (Del Rey) to stem, sort, seed and grade the raisins. Under this scenario, the raisin producer would not be a handler. As set forth above, however, Raisin Valley Farms and Lassen Vineyards collectively packed raisins during the 2002–2003 and 2003–2004 crop years, and charged others for that packing service. To the extent that Raisin Valley Farms and Lassen Vineyards produced raisins, they were not subject to the Marketing Order. But, to the extent that Raisin Valley Farms and Lassen Vineyards custom packed raisins for themselves and others, they were subject to the Marketing Order as handlers. The latter activities are the subject of this

---

[7] Although the term "acquire" is unambiguous, this Court would defer to the USDA's interpretation of the meaning of the term if it were. *Barnhart v. Walton*, 535 U.S. 212, 218 (2002) ("Courts grant an agency's interpretation of its own regulations considerable legal leeway."); *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (To the extent that a regulation is ambiguous, the agency's interpretation of its own regulation is "controlling unless plainly erroneous or inconsistent with the regulation."). Here, the USDA consistently interpreted the meaning of the term "acquire" to include the scenario proposed, and ultimately pursued, by Plaintiffs.

action, and the latter subjects Plaintiffs to the Marketing Order. In sum, Plaintiffs are correct that the Keeney Letter "should be dispositive;" however, the disposition of Plaintiffs' claims based on an accurate reading of this letter exchange and the evidence favors the USDA.

4. Evidence Supports Liability of both Lassen Vineyards and Raisin Valley Farms

In opposition to the USDA's summary judgment motion, Plaintiffs assert that the "USDA failed . . . to assert substantial specific facts as to each 'Respondent' (Plaintiffs herein) that would justify that that specific person or a specific entity was a 'handler' and a handler who 'acquired' raisins and thus subject to the substantial (in this case massive) penalties under the AMAA." The Court notes that the JO used the terms Raisin Valley Farms, Lassen Vineyards, Mr. Horne, and "Mr. Horne and partners" interchangeably in its Initial Decision. At different points of the opinion, the JO found that Raisin Valley, Lassen Vineyards, and "respondents" individually engaged in the handling of raisins and violated the Marketing Order. Ultimately, the JO imposed sanctions against both Raisin Valley Farms and Lassen Vineyards. In the Reconsideration Order, the JO refers to the respondents through the term "Mr. Horne and partners" only. AR 757–778. The JO's findings and orders depart from the ALJ's order that imposed sanctions against Lassen Vineyards only. Plaintiffs contend that there was no evidence presented that any entity handled, packed or acquired raisins.

While this Court finds that the evidence supports the ALJ's conclusion that Lassen Vineyards was the

handler of raisins and violated the Marketing Order, this Court will not disturb the JO's orders. For the following reasons, this Court finds that there is "such relevant evidence as a reasonable mind might accept as adequate to support" the JO's conclusion. *Pierce*, 487 U.S. at 565. Because the record supports more than one rational interpretation of the evidence, the Court will defer to the JO's decision, *Bayliss*, 427 F.3d at 1214 n.1, and will not substitute its judgment for the JO's opinion. *Marsh*, 490 U.S. at 378.

First, this Court agrees with the JO to find "Mr. Horne's business structure confusing at best." AR 685. As the JO explained:

> There appear [sic] to be three main entities, Raisin Valley Farms, Lassen Vineyards, and Raisin Valley Farms Marketing Association. The main problem is that at various times Mr. Horne uses the name "Raisin Valley Farms" for each. Without Mr. Horne's personal knowledge, it is impossible to know which bank account in the name of Raisin Valley Farms is the account for which company. In fact, there was not a bank account in the name of Lassen Vineyards.

AR 685. The following findings of fact represent the interplay between the three entities:

> When Raisin Valley Marketing Association received an order for raisins, Mr. Horne contacted one of the Raisin Valley Marketing Association members

> inquiring if the member would accept the price offered. When Mr. Horne found a grower willing to accept the order, he told that grower to bring the raisins to Lassen Vineyards' packing plant to be stemmed, sorted, cleaned, graded, and packaged. The buyer picked up the packaged raisins and left a bill of lading. When the buyer paid for the raisins, Mr. Horne deposited the funds into an account. Originally, the funds were deposited into an account in the name of Mr. and Mrs. Horne. Mr. Horne changed the account to one named "Raisin Valley Farms Marketing, LLT." Now, Raisin Valley Marketing Association has a "bone fide Association bank account" from which Mr. Horne, for Raisin Valley Farms Marketing Association, disburses funds to Lassen Vineyards, the brokers, and the growers.

AR 674–75. Moreover, the JO found that the confusion of the parties was caused, in significant part, by Mr. Horne's untimely and incomplete production of records. AR 684–85. The JO found that evidence established that the Plaintiffs "play[ed] a kind of shell game with interlocking partnerships and a marketing association to try to conceal their role as first handler." AR 775. Based on Mr. Horne's testimony, in which he interchanged the entities, intermingling of funds, absence of separate bank accounts, and intermingling of duties between the entities, this Court finds that substantial evidence supports the JO's decision against both Raisin Valley

Farms and Lassen Vineyards.

Second, substantial evidence supports the JO's finding that Raisin Valley Farms took direct part in the handling and packing of raisins. The Hornes, under the name of Raisin Valley Farms, filed RAC–5 forms during the 2001–2002, 2002–2003, and 2003–2004 crop years, "notifying the RAC of their intention to handle raisins as a packer under the Raisin Order." AR 670. "All of the raisins packed by Lassen Vineyards in crop years 2002–2003 and 2003–2004 were packaged in boxes stamped with the handler number 94–101. That number had been assigned to Marvin D. Horne and Laura R. Horne" doing business as Raisin Valley Farms. AR 671. Because all of the raisins packed out of Lassen Vineyards were stamped with Raisin Valley Farms' handler number, it was not unreasonable to conclude that Raisin Valley Farms handled and acquired raisins.

5. Plaintiffs' were subject to the Marketing Order notwithstanding their "Lease" Arrangement

Plaintiffs contend that the Marketing Order regulates "[o]nly genuine handlers," and "does not reach equipment lessors." Plaintiffs describe the evidence as follows:

> Yes, there was evidence that Lassen Vineyards leased employees for the purpose of packing raisins and that it also leased equipment to farmers, including the Hornes and Durbahn [sic] so they can pack their own raisins but the Durbahns and Hornes were simply

> producers, not handlers, and Lassen Vineyards, acting as a lessor of labor and equipment and without putting raisins in the stream of interstate commerce or selling said raisins do not make them handlers, not packers, nor processors, nor is evidence of "acquiring" raisins.

Pl. Reply, 4:5–10. The Court finds that the JO correctly rejected Plaintiffs' arguments.

In his testimony, Mr. Horne testified that for a fee, his "family" packing operation "furnished equipment and employees to run the equipment." AR 1669. Lassen Vineyards owned the land, structures, and equipment of the packing plant. AR 1938–40. Lassen Vineyards did not have a separate bank account from the Hornes, Raisin Valley Marketing, or Raisin Valley Farms. AR 2034.

Substantial evidence adduced at the hearings demonstrate that Plaintiffs performed the functions of a handler. According to Mr. Horne's testimony, raisin producers paid Lassen Vineyards through Raisin Valley Marketing and Raisin Valley Farms to send their raisins "through the line; the cap stems are removed; the raisins are washed; they're vacuumed; substandard is removed; sticks, stems, rocks, and any . . . foreign material." AR 1668. The raisins at Lassen Vineyards then go:

> through an observation line where employees remove something that may not have been vacuumed out or a berry or raisin that may have mold on it. And from there, it goes into a scale where it's

> weighed and put into a box with liner—a food grade plastic liner. And the box is then put through taping machine, where it is sealed. And then it goes through another metal detector with a marking device that puts on the side of the box the date, the time packed, the packer number assigned to me, and the lot number of the grower or the customer.

AR 1669–70. Mr. Horne testified that his operation charged raisin producers a fee for the "use of the facility, the labor, the fiber, the plastic [used to package the raisins]." AR 1943. While Mr. Horne may characterize this arrangement as a lease, the evidence demonstrates that Plaintiffs were paid a fee to handle raisins that they had physical possession of in their packing plant, thus subjecting them to the Marketing Order.

Mr. Horne's testimony also revealed that the employees who operated Lassen Vineyards' equipment were employees of Plaintiffs, despite Mr. Horne's efforts to obscure this fact by creating another "leasing" agreement. It is undisputed that Mr. Durbahn supervised and Marvin managed the Lassen Vineyards plant. Plaintiffs assert that the raisin producers packed their own raisins or leased employees who were not associated with the partnership. However, there is no evidence that anyone other than employees of Lassen Vineyards worked at the plant. Moreover, the "leasing employer[s]" of the employees were Ms. Horne and Ms. Durbahn, and most of the employees worked on Lassen Vineyards land.

Legally and factually, Plaintiffs were handlers subject to the Marketing Order despite the "leasing" agreements. No language in the AMAA or Marketing Order provides an exemption for an entity that performs the functions of a handler under a leasing agreement. Plaintiffs fail to support their argument that lessors of labor and equipment are exempt from the Marketing Order. The substantial evidence establishes that Plaintiffs were handlers, notwithstanding the various entities and lease agreement arrangements. The evidence supports the JO's conclusion that Plaintiffs were playing "a kind of shell game with interlocking partnerships and a marketing association to try to conceal their role as first handler." AR 775. The evidence further supports the JO's conclusion that "Marvin Horne and partners put in place a scheme to enhance their profitability by avoiding the requirements of the Raisin Order. By so doing, they obtained an unfair competitive advantage over everyone else in the raisin industry who complied with the Raisin Order." AR 694.

6. Raisin producers are exempt from the Marketing Order in their capacity as producers, not in their capacity as handlers

Plaintiffs contend that as producers, they are exempt from the Marketing Order. As set forth above, the AMAA and the Marketing Order impose obligations on handlers, not producers. The AMAA specifically excludes producers from regulation pursuant to the Marketing Order. 7 U.S.C. § 608c(13)(B). More specifically, the AMAA provides that a marketing order does not apply to "any producer *in his capacity as producer.*" 7 U.S.C. § 608c(13)(B) (emphasis added).

The exemption of 7 U.S.C. § 608c(13)(B) applies to Raisin Valley Farms and Lassen Vineyards in their capacities as raisin producers, but does not provide an exemption from the Marketing Order in their capacities as handlers. "The language 'in his capacity as * * * ' limits the exemption [.]" *Acme Breweries v. Brannan*, 109 F. Supp. 116, 188 (N.D. Cal. 1952) (holding that hops producer was exempt from regulation as a producer under § 8c(13)(B) of the Act, but that it could be regulated as a handler since it did something to the hops other than grow them). Based on the express and explicit limiting clause, Plaintiffs are only exempt from the Marketing Order in their capacity as producers of raisins. *See Ideal Farms, Inc. v. Benson*, 288 F.2d 608, 614 (3d Cir. 1961), *cert. denied*, 372 U.S. 965 (1963) ("Other provisions of this section of the Act explicitly recognize that a person or business entity may be engaged in the milk business in more than one capacity and that a producer is exempt from regulation only in his capacity as a producer.") (citing 7 U.S.C. § 608c(13)(B)); *see also, United States v. United Dairy Farms Co-op. Ass'n*, 611 F.2d 488, 491 n. 7 (3rd Cir. 1979) ("producers who also function as handlers ... are subject to regulation under the milk marketing order); *Freeman v. Vance*, 319 F.2d 841, 842 (5th Cir. 1963) (same). As the administrator's action against Plaintiffs focuses on Plaintiffs' activities as handlers, the 7 U.S.C. § 608c(13)(B) exemption is inapplicable. *See Lion*, 416 F.3d at 1360 ("Although producers are not directly bound by the statute, 7 U.S.C. § 608c(13)(B), under the specific terms of the Raisin Marketing Order, all persons seeking to market California raisins out-of-state are deemed handlers and must comply with the Order.")

In opposition, Plaintiffs repeat the assertion that "noone at USDA advised the Plaintiffs that [their proposed activities] would violate the Marketing Order." To the contrary, the USDA advised Plaintiffs on *multiple* occasions that a raisin producer who performs handling functions upon his or her own crop is subject to the Marketing Order. Additionally, the administrator and the RAC advised Plaintiffs that their proposed activities would fall within the Marketing Order regulations. Accordingly, Plaintiffs' assertion is insincere at best.

In addition to the Keeney Letter above, the USDA sent Plaintiffs advisory letters to interpret the Marketing Order regulations as they relate to Plaintiffs' proposed activities. In a January 18, 2002 letter, Maureen T. Pello, Senior Marketing Specialist in the Fresno, California Field Office of the AMS informed Mr. Horne that his proposed activities would make him a handler under the Marketing Order:

> As we discussed, based upon your description of your proposed activities, you would be considered a handler under the Federal Marketing Order for California raisins. . . . As a handler, you would be required to meet all of the order's regulations regarding volume control, quality control (which includes incoming and outgoing inspections), assessments, and reporting to the Raisin Administrative Committee.

AR 6329. On May 20, 2002, the administrator (AJ Yates) responded to an inquiry from the Hornes with

the following message:

> You indicate in your correspondence that you plan to pack and market your own raisins. Such activities would make you a handler under the order. As a handler, you would be required to meet all of the order's regulations. . . . Those who pack raisins are handlers under the order.

AR 6330–31. A year later, the administrator reiterated this point in response to another letter from the Hornes. The administrator wrote: "You state that 'handler producer' raisins are not acquired and therefore are not subject to the order's reserve requirements. This is not accurate. Handlers who produce and handle raisin production are subject to marketing order requirements, including reserve requirements." AR 6373–74.

The RAC also advised Mr. Horne that he is not exempt from the Marketing Order as a producer if he handles raisins. On January 21, 2002, the RAC's Director of Compliance advised Mr. Horne in a letter that a handler is not exempt from the Marketing Order even if he or she is a producer. AR 2444–45. Notably, the Director of Compliance explained: "More than half of the recognized handlers on the RAC Raisin Packer list are also producers of raisins," and that those handler-producers comply with the Marketing Order's requirements. *Id.*

7. Farmer to Consumer Direct Marketing Act is inapplicable

Plaintiffs contend that they were exempt from the Marketing Order because their activities were in compliance with the Farmer to Consumer Direct Marketing Act, 7 U.S.C. § 3001 et seq. ("Farmer to Consumer Act"), passed by Congress forty years after the AMAA. Plaintiffs assert that the Farmer to Consumer Act is a "national policy that encouraged producers' circumvention of packers and middlemen." The Farmer to Consumer Act's statement of purpose declares:

> It is the purpose of this chapter to promote, through appropriate means, and on an economically sustainable basis, the development and expansion of direct marketing of agricultural commodities from farmers to consumers. To accomplish this objective, the Secretary of Agriculture (hereinafter referred to as the "Secretary") shall initiate and coordinate a program designed to facilitate direct marketing from farmers to consumers for the mutual benefit of consumers and farmers.

7 U.S.C. § 3001. Plaintiffs argue that the JO erred to impose assessments and penalties of nearly $700,000 "for selling raisins directly to the consumer, avoiding the 'middle man' as Congress directed the Secretary to implement in 1976 through 7 U.S.C. § 3001."

The USDA contends that the JO correctly rejected Plaintiffs' argument that the Farmer to Consumer Act creates an exemption to the Marketing Order. The USDA argues that Plaintiffs may not rely on the Farmer to Consumer Act for two reasons. First, the USDA maintains that nothing in the language of the Farmer to Consumer Act creates an exemption to the Marketing Order. Second, the USDA asserts that Plaintiffs offered no evidence that their activities were within the meaning of the Farmer to Consumer Act. As discussed below, both of the USDA's arguments are meritorious.

Both the ALJ and the JO found Plaintiffs' argument related to the Farmer to Consumer Act "patently specious." AR 772. This Court agrees. The ALJ and JO concluded that the Farmer to Consumer Act does not exempt raisin producers from the requirements of the Marketing Order. In this appeal, Plaintiffs have failed to articulate why this conclusion is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). The USDA points out that nothing in the language of the Farmer to Consumer Act creates an exception to the Marketing Order. Plaintiffs repeat their position that they are exempt from the Marketing Order pursuant to the Farmer to Consumer Act, but cite no authority to support their position. Without authority or argument to support their position, Plaintiffs fail to carry their burden to identify the fault in the JO's reasoning and conclusion. *See, Save Our Heritage, Inc.*, 269 F.3d 49. Accordingly, the JO's decision that the Farmer to Consumer Act does not exempt Plaintiffs from the requirements of the Marketing Order is not clearly erroneous.

Moreover, even if the Farmer to Consumer Act did create an exemption to the Marketing Order for raisin producers, Plaintiffs failed to establish that their activities fell within the Farmer to Consumer Act or its goals. The Farmer to Consumer Act defines "direct marketing" from farms to consumers as:

> the marketing of agricultural commodities at any marketplace (including, but not limited to, roadside stands, city markets, and vehicles used for house-to-house marketing of agricultural commodities) established and maintained for the purpose of enabling farmers to sell (either individually or through a farmers' organization directly representing the farmers who produced the commodities being sold) their agricultural commodities directly to individual consumers, or organizations representing consumers, in a manner calculated to lower the cost and increase the quality of food to such consumers while providing increased financial returns to the farmers.

7 U.S.C. § 3002. Pursuant to this statutory definition, Plaintiffs would need to sell their raisins "directly to individual consumers" in marketplaces such as "roadside stands, city markets," farmer's markets, and the like to fall within the Farmer to Consumer Act. *Id.* Plaintiffs introduced no evidence to support their repeated claim that the raisins packed at Lassen Vineyards were sold directly to

consumers. To the contrary, the evidence submitted led the JO's reasonable conclusion that: "Mr. Horne and partners sold raisins in wholesale packaging and quantities, frequently to candy makers and other food processors as ingredients for other food products. Mr. Horne and partners showed no connection between their business activities and the goals of the Farmer–to–Consumer Direct Marketing Act." AR 772. As the USDA points out, the evidence introduced during the administrative hearing established that Plaintiffs' raisins were packaged in large cases (AR 1740–41) and sold in large quantities—often tens of thousands of pounds—to commercial food companies. E.g., AR 2458 (invoice from Raisin Valley Farms to New York candy company for 1,160 twenty-five-pound cases of raisins); AR 2724 (invoice to Canadian food company for 1,190 thirty-pound cases of raisins); AR 2732 (invoice to Pennsylvania nut products company for 1,400 thirty-pound cases of raisins); AR 2863 (invoice to baking company for 700 thirty-pound cases of raisins). Plaintiffs offer no evidence to refute these invoices and offer no evidence that Plaintiffs sold raisins directly to consumers. Accordingly, the substantial evidence of the administrative record supports the JO's conclusion that the Farmer to Consumer Act was inapplicable to Plaintiffs and their activities during the 2002–2003 and 2003–2004 crop years.

B. Whether the penalties imposed violate the Excessive Fines Clause of the Eighth Amendment

Plaintiffs contend that the assessments and penalties imposed by the JO violate the Excessive

Fines Clause of the Eighth Amendment to the United States Constitution. Plaintiffs argue that the imposition of "almost $700,000—for selling raisins directly to the consumer, avoiding the 'middle man' as Congress directed," is an excessive fine because: (1) the USDA cannot demonstrate "harm" from Plaintiffs' activities; (2) Plaintiffs' actions were in compliance with the Farmer to Consumer Act; and (3) Plaintiffs "used every available means to determine in advance whether or not what they anticipated and proposed doing was an alleged violation of the Marketing Order."

The Eighth Amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const., Amdt. 8. The word "fine" within this amendment has been interpreted to mean "a payment to a sovereign as punishment for some offense." *United States v. Bajakajian*, 524 U.S. 321, 328 (1998) (quoting *Browning-Ferris Industries of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 265 (1989)). The Excessive Fines Clause thus "limits the government's power to extract payments, whether in cash or in kind, as punishment for some offense." *Austin v. United States*, 509 U.S. 602, 609–610 (1993) (emphasis deleted); *see also, Enquist v. Oregon Dep't of Agric.*, 478 F.3d 985, 1007 (9th Cir. 2007) (Excessive Fines Clause applies to a government action that constitutes a punishment for an offense). Pursuant to *Bajakajian, supra*, a fine is unconstitutionally excessive if it is "grossly disproportional to the gravity of the defendant's offense." 524 U.S. at 334–35. "Excessive fines challenges involve a two-step inquiry: (1) whether the Excessive Fines Clause applies, and (2) if so,

whether the fine is 'excessive.'" *Enquist*, 478 F.3d at 1006 (citing *Bajakajian*, 524 U.S. at 334).

The JO imposed three distinct remedies against Plaintiffs: (1) an order to pay the RAC $483,843.53 pursuant to 7 C.F.R. § 989.166(c); (2) an order to pay the RAC $8,783.39 in assessments pursuant to 7 C.F.R. § 989.80(a); and (3) civil penalties in total of $202,600 pursuant to 7 U.S.C. § 608c(14)(B). Plaintiffs' Eighth Amendment arguments are the same for each of the three penalties and assessments, and Plaintiffs assert that the entire sum is unconstitutional. Nevertheless, this Court considers Plaintiffs' challenge as it applies to each remedy under each regulation to determine whether the Excessive Fines Clause applies and, if so, whether the fine was excessive.

When reviewing the JO's choice of sanctions, this Court is limited to determining "whether, under the pertinent statute and relevant facts, the Secretary made an allowable judgment in choice of remedy." *Balice*, 203 F.3d at 689 (citing *Farley & Calfee, Inc. v. U.S. Dep't of Agric.*, 941 F.2d 964, 967 (9th Cir. 1991)). This Court will not overturn a penalty unless it is either "unwarranted in law or unjustified in fact." *Bosma v. U.S. Dep't of Agric.*, 754 F.2d 804, 810 (9th Cir. 1984) (citing *Butz v. Glover Livestock Comm'n Co.*, 411 U.S. 182, 185–88 (1973)).

1. Reserve requirement compensation

The JO ordered Plaintiffs to pay $483,843.53 to the RAC, pursuant to 7 C.F.R. § 989.166(c), which reads:

> **Remedy in the event of failure to deliver reserve tonnage raisins. A**

> handler who fails to deliver to the Committee, upon request, any reserve tonnage raisins in the quantity and quality for which he has become obligated . . . shall compensate the Committee for the amount of the loss resulting from his failure to so deliver. . . . The amount of compensation for any shortage of tonnage shall be determined by multiplying the quantity of reserve raisins not delivered by the latest weighted average price per ton received by producers during the particular crop year for free tonnage raisins of the same varietal type or types[.]"

Id. Pursuant to this regulation, the JO multiplied the quantity of the reserve raisins Plaintiffs failed to deliver for crop years 2002–2003 and 2003–2004 by the applicable average prices per ton to arrive at the total penalty. Plaintiffs do not challenge the JO's calculation of the fine. Rather, Plaintiffs argue that the penalty violates the Excessive Fines Clause because the USDA failed to demonstrate a harm in the amount of $483,843.53.

The USDA argues successfully that the Excessive Fines Clause is inapplicable to the penalty imposed based on 7 C.F.R. § 989.166(c), because the regulation is compensatory, not punitive. The plain language of the statute makes clear that this provision requires a handler who fails to deliver reserve raisins to "*compensate* the Committee *for the amount of the loss* resulting from his failure to deliver." 7 C.F.R. § 989.166(c) (emphasis added). Compensating the government for a loss serves a

remedial purpose, but is not punitive. *Bajakajian*, 524 U.S. at 328 (citing Black's Law Dictionary 1293 (6th ed. 1990) ("[R]emedial action" is one "brought to obtain compensation or indemnity")). By its terms, the penalty pursuant to 7 C.F.R. § 989.166(c) compensates the RAC for lost revenues and recovers the value that Plaintiffs failed to deliver into the reserve pool. Thus, the penalty imposed, which allows the USDA to recover from Plaintiffs the dollar equivalent of the California raisins that Plaintiffs failed to hold in reserve for crop years 2002–2003 and 2003–2004, is remedial rather than punitive. *See, One Lot Emerald Cut Stones v. United States*, 409 U.S. 232, 237 (1972) (monetary penalty provides "a reasonable form of liquidated damages" to the Government and is thus a "remedial" sanction because it compensates Government for lost revenues). Because 7 C.F.R. § 989.166(c) is a remedial provision, the JO's order based on that regulation does not impose a "fine" subject to the Excessive Fines Clause.[8]

2. Assessment payment

The JO ordered Plaintiffs to pay $8,783.39 in assessments for the 2002–2003 and 2003–2004 crop years, pursuant to 7 C.F.R. § 989.80(a), which reads:

> Each handler shall, with respect to free tonnage acquired by him . . . pay to the [RAC], upon demand, his pro rata share

---

[8] Even if the Excessive Fines Clause applies to the challenged regulation, the fine imposed by the JO does not violate the Eighth Amendment because the fine is not "excessive," as explained more fully *infra*.

> of the expenses . . . which the Secretary finds will be incurred, as aforesaid, by the [RAC] during each crop year. . . . Such handler's pro rata share of such expenses shall be equal to the ratio between the total free tonnage acquired by such handler . . . during the applicable crop year and the total free tonnage acquired by all handlers during the same crop year.

The JO multiplied the established assessment rate of $8 per ton by the established free tonnages to determine the total assessments due for the 2002–2003 and 2003–2004 crop years. Plaintiffs do not challenge the JO's calculation of the assessments.

Similar to the challenge above, Plaintiffs argue that the JO's order to pay $8,783.39 was an excessive fine because the USDA failed to demonstrate harm. Plaintiffs argue that they were not handlers, were not subject to the Marketing Order, and the JO's order is a "post hoc vendetta against Plaintiffs" by the USDA to punish Plaintiffs for activities that comply with the Farmer to Consumer Act.

The USDA contends that the remedy under 7 C.F.R. § 989.80(a), like 7 C.F.R. § 989.166(c) discussed above, is compensatory. The USDA argues that the JO's order to pay $8,783.39 in assessments was designed to compensate the RAC for Plaintiffs failure to pay the assessments, as required by the Marketing Order. The USDA concludes that 7 C.F.R. § 989.80(a) is not subject to the Excessive Fines Clause.

The provision that requires handlers to pay assessment to the RAC, 7 C.F.R. § 989.80(a), is not punitive in nature; the assessments are levied to fund the RAC and its operations. *See Evans v. United States*, 74 Fed. Cl. 554, 557 (2006), *aff'd by Evans v. United States*, 250 Fed. Appx. 321 (Fed. Cir. 2007). As set forth above, the RAC receives no federal appropriations. The RAC is funded by the assessments levied on handlers pursuant to 7 C.F.R. § 989.80(a) and from the proceeds of sales of the reserve raisins withheld from the open market. *Evans*, 74 Fed. Cl. at 557 (citing 7 C.F.R. §§ 989.53, 989.79, 989.80(a), 989.82). Under this regulation, the Marketing Order requires all raisin handlers to pay assessments to the RAC to fund the RAC and its operations. The obligation to pay is automatic and is triggered by a handler's acquisition or receipt of raisins; it requires no culpability. *C.f., Bajakajian*, 524 U.S. at 328 (forfeiture of currency is punishment because it is a an "additional sanction . . . imposed at the culmination of a criminal proceeding and requires conviction of an underlying felony"). Thus, assessments are not impoeed on handlers as a punishment for an action. Because 7 C.F.R. § 989.80(a) a funding regulation that is not punitive in nature, the JO's order based on that regulation does not impose a "fine" subject to the Excessive Fines Clause.

3. Civil Penalties

In addition to the compensatory assessments and penalties above, the JO imposed civil penalties totaling $202,600 against Plaintiffs pursuant to 7 U.S.C. § 608c(14)(B), which reads:

> Any handler subject to an order issued under this section . . . who violates any provision of such order may be assessed a civil penalty by the Secretary not exceeding $1,000 for each such violation. Each day during which such violation shall be deemed a separate violation. . . . The Secretary may issue an order assessing a civil penalty under this paragraph only after notice and an opportunity for an agency hearing on the record. Such order shall be treated as a final order reviewable in the district courts of the United States in any district in which the handler subject to the order is an inhabitant, or has the handler's principle place of business. The validity of such order may not reviewed in an action to collect such civil penalty.

Neither party disputes that this provision is punitive in nature, designed to punish a handler who violates any provision of the Marketing Order. Thus, the civil penalty is a "fine" within the meaning of the Excessive Fines Clause.

Because the JO imposed a "fine" pursuant 7 U.S.C. § 608c(14) (B), this Court must determine whether the fine imposed was excessive. A fine is unconstitutionally excessive if it is "grossly disproportional to the gravity of the defendant's offense." *Bajakajian*, 524 U.S. at 334–35. "Whether a penalty is grossly disproportionate calls for the application of a constitutional standard to the facts

of a particular case, and in that context, de novo review is appropriate." *Balice*, 203 F.3d at 698.

The JO found that Plaintiffs committed the following violations:

- Twenty violations of section 989.73 of the Raisin Order (7 C.F.R. § 989.73) by filing inaccurate forms with the RAC on 20 occasions.

- Fifty-eight violations of section 989.58(d) of the Raisin Order (7 C.F.R. § 989.58(d)) by failing to obtain incoming inspections of raisins on 58 occasions.

- Two violations of 989.80 of the Raisin Order (7 C.F.R. § 989 .80) by failing to pay assessments to the RAC in crop year 2002–2003 and crop year 2003 and 2004.

- Five hundred ninety-two violations of sections 989.66 and 989.166 of the Raisin Order (7 C.F.R. §§ 989.66, .166) by failing to hold raisins in reserve and by failing to pay the RAC the dollar equivalent of the raisins not held in reserve.

- One violation of section 989.77 of the Raisin Order (7 C.F.R. § 989.77) for failing to allow access to Plaintiffs' records.

To deter Plaintiffs from continuing to violate the Marketing Order, and to deter others from similar future violations, the JO concluded that the following civil penalties for these violations were "appropriate" and "sufficient": (1) $300 per violation for filing inaccurate reporting forms; (2) $300 per violation for the failure to obtain incoming inspections; (3) $300

per violation for failing to pay the assessments; (4) $300 per violation for failure to hold raisins in reserve; and (5) $1000 for the failure to allow access to records.

When determining whether fines are excessive, the Court first considers that "judgements about appropriate punishment for an offense belong in the first instance to the legislature." *Balice*, 203 F.3d at 699 (quoting *Bajakajian*, 524 U.S. at 336) (citing *Solem v. Helm*, 463 U.S. 277, 290 (1983)). The USDA points out that the civil penalties imposed by the JO fall well below the level authorized by Congress. As set forth above, Congress authorized civil penalties up to $1,000 for each violation. In addition, Congress mandated that "[e]ach day during which such violation continues shall be deemed a separate violation." 7 U.S.C. § 608c(14)(B). The JO found 673 separate violations, spanning over a two year period of time. Thus, the JO was authorized by statute to impose a civil penalty of no less than $673,000. The potential civil penalty calculation would be substantially larger if the JO imposed the maximum penalty of $1,100, pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, and/or considered that each violation occurred over multiple days.[9] Considering the fine in total, $202,600 is not an excessive fine to punish 673 separate violations of the Marketing Order, when the JO could have imposed a fine of $673,000 or more. The JO imposed

---

[9] As the JO noted, the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended, 28 U.S.C. § 2461 note, adjusted the civil monetary penalty that may be assessed under the AMAA. For each violation of a marketing order, the maximum civil penalty is $1,100. 7 C.F.R. § 3.91(b)(1)(vii).

a $300 fine for 672 violations, less than one-third of the amount authorized by statute. *C.f.*, *Balice*, 203 F.3d 684 (finding that statutory maximum of $2,000 penalty for AMAA violation of almond marketing order was not an excessive fine for handler's failure to report, keep accurate records, and hold almonds in reserve). Accordingly, the Court finds that the $202,600 in civil penalties assessed on Plaintiffs by the JO pursuant to 7 U.S.C. § 608c(14)(B) is not "grossly disproportional to the gravity of the [plaintiffs'] offense[s]." *Bajakajian*, 524 U.S. at 334–35.

Plaintiffs contend that the fines are excessive because: (1) the USDA cannot demonstrate "harm" to anyone caused by Plaintiffs' activities; (2) Plaintiffs' actions complied with the Farmers to Consumers Direct Marketing Act; (3) Plaintiffs were not handlers and, therefore, not subject to the Marketing Act. Plaintiffs' second and third arguments have been discussed *infra*, and are unpersuasive and inapposite to this analysis. As to Plaintiffs' argument that would require the USDA to demonstrate harm, the Ninth Circuit rejected this argument in a case similar to the one at bar.

In *Balice*, almond handlers challenged penalties imposed under 7 U.S.C. § 608c(14) as constitutionally excessive because the violations resulted in "no harm to the Government and no harm to the industry." 203 F.3d at 699. The *Balice* almond handlers committed offenses similar to those committed by Plaintiffs, and the USDA imposed fines on them pursuant to 7 U.S.C. § 608c(14) for violating the record keeping, reporting, and reserve requirements of the Almond Marketing Order, 7

C.F.R. § 981.1 et seq, a marketing order similar to the Marketing Order governing Plaintiffs. In *Balice*, the appellant almond handlers argued that the JO's decision to increase the fine from $1000 per violation to $2000 without requiring the USDA to demonstrate harm was arbitrary and capricious. In rejecting the appellant's argument, the Ninth Circuit looked at the language of the statute and found that to require the USDA to demonstrate harm "would contravene the express terms" of the statute. *Balice*, 203 F.3d at 694. Similarly, the express terms of 7 U.S.C. § 608c(14) require the USDA to demonstrate that a handler violated the marketing order, but do not require any further demonstration. Accordingly, this Court "declines to accept [Plaintiffs'] suggestion that the USDA was required to show harm to the government before the JO could" impose a penalty pursuant to 7 C.F.R. § 989.166(c).[10] *Balice*, 203 F.3d at 694.

Moreover, Plaintiffs' arguments misrepresent Plaintiffs' conduct and culpability. As set forth above, the JO did not err to find that Plaintiffs were subject to the Marketing Order as handlers that acquired

---

[10] For this reason, the USDA was also not required to demonstrate harm before ordering Plaintiffs to compensate the RAC for the failure to hold the reserve raisins pursuant to 7 C.F.R. 989.166(c). Pursuant to the regulation, the USDA shall recover the amount of the loss from a handler who fails to deliver reserve tonnage raisins to the RAC. 7 C.F.R. § 989.166(c). No language in the regulation requires the USDA to demonstrate harm, and Plaintiffs point to no authority to construe the regulation in this way. Because Plaintiffs' suggestion that 7 C.F.R. § 989.166(c) requires the USDA to demonstrate "harm" contravenes the express terms of the regulation, this Court rejects it.

raisins. Although they were handlers, Plaintiffs filed inaccurate reports, failed to obtain inspections, failed to hold raisins in reserve, and failed to allow access to records. As the Ninth Circuit explained in *Balice*, 203 F.3d at 699, these actions threaten to cause severe consequences to the entire industry:

> Balice willfully failed to maintain records for important transactions. . . . That violation largely frustrated the USDA's attempts to ensure that Balice was complying with other provisions of the Almond Marketing Order, and it interfered with the Almond Board's ability to set its economic policy.
>
> Even worse, Balice unlawfully disposed of reserve almonds, which were lawfully salable at only $0.05 to $0.08 per pound, when the prevailing market price for the almonds was $1.40 per pound. That conduct not only resulted in an illegal profit of roughly $246,677, but it also undermined the Secretary's efforts to protect the stability of the almond market.

Similarly, the USDA has an important need to control the stability of the raisin market, as expressed in the AMAA and the Marketing Order. Like the actions of the *Balice* almond handlers, Plaintiffs' actions interfered with the RAC's ability to set its economic policy. Plaintiffs' introduction of the reserve raisins into the open market yielded illegal profits and could have resulted in market instability and a downward spiral in prices. Because of the

serious nature of the Plaintiffs' conduct, with its severe and far-reaching effects, this Court finds that a $300 fine is not an excessive amount for each of Plaintiff's violations, described above, and $1,000 is not an excessive fine for Plaintiffs' failure to allow access to their records. *See, Balice*, 203 F.3d 684; *Cole v. USDA*, 133 F.3d 803 (11th Cir. 1998) (holding that a $400,000 penalty, representing a forfeiture of 75% of the sale price of over-quota tobacco, was not excessive given the legislative purpose of discouraging the over-supply of tobacco in the marketplace).[11]

C. Whether the reserve requirements violate the Fifth Amendment as a physical taking without just compensation

Plaintiffs argue that the reserve raisin program of the Marketing Order, 7 C.F.R. §§ 989.65–98, constitutes a physical taking of tangible property by the government without just compensation in violation of the Fifth Amendment to the United States Constitution. Plaintiffs assert, without citation, that the "elements necessary for a takings claim are present if (1) private property, (2) is taken, (3) for public use, (4) without just compensation." Pl. Memo, 20:3–4. Without citation, Plaintiffs argue that they "routinely evidenced and argued all these

---

[11] The instant action is distinguishable from the cases relied upon by the USDA in that the JO imposed both compensatory and civil penalties and assessments on Plaintiffs. In *Balice* and *Cole*, the JO imposed penalties pursuant to either one regulation or the other, but not both. Because Plaintiffs failed to raise this point, however, the Court need not address whether the distinction changes the Excessive Fines Clause analysis.

elements." Plaintiffs assert that raisins are personal, private property and the government has paid no just compensation for the reserve tonnage raisins that the USDA takes each year. Plaintiffs contend that although Congress may take actions to regulate the industry, "[n]o court has ever held that the Commerce Clause trumps, eliminates, or eviscerates the Takings Clause in a physical takings case." Thus, "[w]hile Congress may allow the permanent deprivation of a citizens [sic] physical property, the government must pay fair market value." Plaintiffs conclude: "The government can't have it both ways: it can't refuse to pay just compensation, and then penalize, monetarily, Plaintiffs for refusing to transfer title and possession to the government." *Id.* at ll. 14–16.

As introduced above, the Marketing Order creates the raisin reserve requirement program. The purpose of the reserve requirement program is to control the supply of raisins in the domestic market and, accordingly, to regulate the price of the commodity. "By regulating the amount of raisins in this market, the USDA can, in effect, regulate the price at which raisins are sold domestically." *Lion Raisins, Inc. v. U.S.*, 58 Fed. Cl. 391, 394 (2003). Accordingly, the "primary focus" of the market control program is to "maximize return to the grower." Daniel Bensing, *The Promulgation and Implementation of Federal Marketing Orders Regulating Fruit and Vegetable Crops Under the Agricultural Marketing Agreement Act of 1937*, 5 San Joaquin Agric. L. Rev. 3, 6 (1995).

The reserve requirement program is administered by the RAC. By February 15 of each crop year, the RAC must recommend to the USDA the portion of

the crop that should be made available to sale without restrictions ("free tonnage") and the portion that should be withheld from the market ("reserve tonnage"). 7 C.F.R. §§ 989.54(d), 989.65. Based on the RAC's recommendations, and after obtaining the approval of two-thirds of California raisin producers, or of producers of two-thirds of raisins "produced for market, the USDA promulgates a regulation fixing the percentages of "reserve tonnage" and "free tonnage" raisins. 7 U.S.C. §§ 608c(8) (A)-(B), 9(B)(i)-(ii); 7 C.F.R. §§ 989.55, 989.65. In *Lion III*, the court explained the reserve requirement program as follows:

> Free-tonnage raisins may be disposed of by the handler in any marketing channel. Producers receive immediate payment from handlers, at the field market price, for the free-tonnage raisins. The market price for the free-tonnage raisins, or the field price, is not set by the RAC, but is determined through a private bargaining process carried out between producers' and handlers' bargaining associations. Producers are not paid immediately for reserve raisins. Reserve-tonnage raisins are held by handlers for the account of the reserve pool, which is operated by the RAC. *Lion I*, 58 Fed. Cl. at 394. Reserve raisins are sold, as authorized by the RAC, in non-competitive outlets, such as school lunch programs. *Id.*; 7C.F.R. §§ 989.65–67. The statute provides for "the equitable distribution of

> the net return derived from the sale [of reserve pool raisins] among the persons beneficially interested therein." 7 U.S.C. § 608c(6)(E). The RAC is charged with selling the reserve raisins in a manner "intended to maxim[ize] producer returns and achieve maximum disposition of such raisins by the time reserve tonnage raisins from the subsequent crop year are available." 7 C.F.R. § 989.67(d)(1). Since the mid–1990's, the RAC has been using the reserve pool to support an industry export program that effectively blends down the cost of exported California raisins thereby allowing handlers to be price-competitive in export markets where prices are generally lower than the domestic market.

416 F.3d at 1360.

The Marketing Order requires handlers to separate raisins into two sets of bins—one for "free tonnage" and one for "reserve tonnage." 7 C.F.R. §§ 989.54, 989.55, 989.65, 989.66(b)(2). "The reserve raisins are not warehoused in any central location, but rather stored by handlers on their own premises, and are released for sale per the instructions of the RAC." *Lion III*, 416 F.3d at 1360. Title to the "reserve tonnage" portion of the producer's raisins automatically transfers to the RAC for sale in secondary, non-competitive markets. *See* 7 C.F.R. §§ 989.65, 989.66(a), (b) (1), (4). In exchange, "[p]roducers are entitled by regulation to an equitable distribution of the net proceeds from the

RAC's disposition of the 'reserve tonnage' raisins." *Evans*, 74 Fed. Cl. at 557.

In crop year 2002–2003, the free tonnage was 53% and the reserve tonnage was set at 47% of a producer's crop. The RAC sold the 2002 reserve pool for $970 per ton in 2004. None of the money the RAC received was paid back to the raisin producers. For the 2003–2004 crop year, the reserve tonnage was set at 30%.[12]

It is undisputed that every year, through the reserve requirement program, the RAC takes title to a significant portion of a California raisin producer's crop. The Court must determine here whether, as Plaintiffs argue, this constitutes a "physical taking" of their property by the government that requires just compensation under the Fifth Amendment. The federal government is liable in a Taking Clause suit for the actions of the RAC, as its agent. *Lion III*, 416 F.3d 1356. The issue of what constitutes a "taking" is a federal question governed by federal law. *Johnson v. U.S.*, 479 F.2d 1383 (Fed. Cir. 1973). To determine the meaning of "property," and what property rights exist under the Fifth Amendment, federal courts look to local state law. *Richmond Elks Hall Ass'n v. Richmond Redevelopment Agency*, 561 F.2d 1327 (9th Cir. 1977).

The Takings Clause does not prohibit the taking of private property, but instead places a condition on the exercise of that power. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528 (2005). The Fifth Amendment is

---

[12] The reserve tonnage percentage changes each year, sometimes radically. For example, the reserve tonnage portion was 62.5% in 1983 and 17.5% in 2005.

designed not to limit governmental interference with property rights per se, but rather to secure compensation in the event of an otherwise proper interference amounting to a taking. *Id.* Here, the RAC takes title to Plaintiffs' reserve tonnage through the AMAA and the Marketing Order by operation of Congress's power to regulate the raisin industry through the Commerce Clause authority. *See United States v. Rock Royal Co-Op., Inc.*, 307 U.S. 533, 569, 572 (1939) (upholding AMAA as constitutional under the Commerce Clause and rejecting Fifth Amendment due process and taking contentions, because "the Congress would have, clearly, the right to permit only limited amounts of milk to move in interstate commerce, [and therefore] it might permit the movement on terms of pool settlement here provided."); *see also, Evans*, 74 Fed. Cl. at 559 (discussing *Rock Royal*). Congress's power to regulate commerce, however, "does not immunize the federal government from a takings claim under the Fifth Amendment." *Evans*, 74 Fed. Cl. at 560. Thus, "the Commerce Clause may provide the authority for a taking, but it does not negate the Fifth Amendment's command that the government, having taken a person's property, must pay just compensation." *Id.* (citing *Yancey v. United States*, 915 F.2d 1534, 1540 (Fed. Cir. 1990)).

The question presented to this Court is whether the transfer of title on the reserve tonnage raisins is a *physical* taking that requires compensation. The federal government may "take" private property, requiring just compensation, either by physical invasion or by regulation. *American Pelagic Fishing Co., L.P. v. U.S.*, 379 F.3d 1363 (Fed. Cir.), *cert. denied*, 545 U.S. 1139 (2004). *Norman v. U.S.*, 63

Fed. Cl. 231 (2003), *aff'd*, 429 F.3d 1081, *cert. denied*, 547 U.S. 1147 (2003). The distinction between a "physical" taking and a "regulatory" taking is significant. *See, Brown v. Legal Foundation of Washington*, 538 U.S. 216 (2003) (payment of compensation is required whenever the government acquires private property for a public but the text of the Just Compensation Clause contains no comparable reference to a regulatory taking). Whereas an invasion of a person's physical property will be considered a physical taking, a "taking" is less likely to be found when a party challenges the government's interference with a property interest that arises from some public program that adjusts benefits and burdens of economic life to promote the common good. *Sadowsky v. City of New York*, 732 F.2d 312 (2nd Cir. 1984). Moreover, while physical takings are compensable, *see Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 427 (1982), not all regulatory takings are. *See, Outdoor Graphics, Inc. v. City of Burlington*, 103 F.3d 690 (8th Cir. 1996) (Whether particular restriction amounts to taking depends on economic impact of regulation on claimant, extent to which regulation has interfered with distinct, investment-backed expectations, and character of government regulation.). With this distinction in mind, this Court turns to Plaintiffs' argument that the reserve requirement constitutes a physical taking.

One other court has considered the issue at bar.[13] In *Evans*, 74 Fed. Cl. 554, the Court of Federal

---

[13] For other takings claims related to the raisin Marketing Order, *see Lion Raisins v. U.S.*, 58 Fed. Cl. 391 (2003) (Lion I);

Claims considered whether the transfer of title to the reserve tonnage raisins constituted a physical taking. The *Evans* court noted that under California law, the plaintiffs "unquestionably held title to their raisins grown in their fields." 74 Fed. Cl. at 563. The court found that at the time the raisins become subject to regulation under the Marketing Order (when the handler acquires the raisins), "the producers acquired in exchange personal property consisting of cash (for the 'free tonnage' raisins) and an equitable interest in the net proceeds of the 'reserve tonnage' raisins." *Id.* The court understood this transfer, required under the Marketing Order, to render plaintiffs the following property interests: "Plaintiff producers retained a property interest in the raisins, and they retained a property interest in the proceeds from the raisins." The *Evans* court concluded that the transfer of reserve tonnage raisins was not a physical taking, because:

> although the RAC gains title to some of the raisins that plaintiffs grow, the transfer does not have the same consequences as, for example, entry by governmental officials upon their land for purposes of confiscating their rains would have. There is no physical invasion of property (citations omitted) . . . nor is there any "direct appropriation of property." (citations omitted). Instead, the government is the recipient of a portion of the raisins that plaintiffs

---

Lion Raisins v. U.S., 57 Fed. Cl. 435 (2003) (Lion II); and *Lion Raisins v. U.S.*, 416 F.3d 1356 (2005) (Lion III).

> shipped to handlers subject to the marketing order.

74 Fed. Cl. at 563. In addition, the *Evans* court concluded that plaintiffs had no property interest in their reserve tonnage raisins. Without a property interest in the raisins, the Takings Clause was not implicated. The Court opined that "if plaintiffs have a takings claim, it would relate to their property interest, equitable in nature, in the net proceeds from the disposition of the 'reserve tonnage.'" *Id.* at 564. The court's conclusion that plaintiffs have no property interest in the reserve tonnage raisins is based on the following:

> In essence, plaintiffs are paying an admissions fee or toll—admittedly a steep one—for marketing raisins. The government does not force plaintiffs to grow raisins or to market the raisins; rather, it directs that if they grow and market raisins, then passing title to their "reserve tonnage" raisins to the RAC is the admission ticket.

Id.

This Court agrees, in part, with the *Evans* ruling to find that the transfer of title to the reserve tonnage does not constitute a *physical* taking. A physical taking generally occurs occur when there is a physical occupation of a person's property by the government. *Norman v. U.S.*, 63 Fed. Cl. 231, *aff'd*, 429 F.3d 1081, *cert. denied*, 547 U.S. 1147 (2003); *Yee v. City of Escondido*, 503 U.S. 519 (1992) physical taking occurs only where the government requires a

landowner to submit to the physical occupation of his land). By contrast, a "regulatory taking" in violation of the Takings Clause may occur when government action, although not encroaching upon or occupying private property, goes too far and still amounts to a taking. *Anaheim Gardens v. U.S.*, 444 F.3d 1309 (Fed. Cir. 2006); *Norman*, 63 Fed. Cl. 231 (a regulatory taking occurs when a regulation deemed necessary to promote the public interest so imposes on the owner's property rights that, in essence, it effectuates a taking); *Allain-Lebreton Co. v. Department of Army, New Orleans Dist., Corps of Engineers*, 670 F.2d 43 (5th Cir. 1982) (Where there is no physical invasion of or physical damage to a plaintiff's property by the government, the government can be held responsible for a taking only when its own regulatory activity is so extensive or intrusive as to amount to taking.) Thus, while it is not necessary that the government actually take physical possession of property in order for there to be a "taking," a physical invasion must take place for there to be a physical taking, which includes a physical taking requires a "permanent physical occupation" on one's land. *Ridge Line, Inc. v. U.S.*, 346 F.3d 1346 (Fed. Cir. 2003); *see also, e.g., Loretto*, 458 U.S. at 421 (cable television company's installation of its cable facilities on plaintiff's property). In *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001), the Supreme Court explained the distinction:

> The clearest sort of taking occurs when the government encroaches upon or occupies private land for its own proposed use. Our cases establish that even a minimal "permanent physical occupation of real

> property" requires compensation under the Clause. *Loretto v. Teleprompter Manhattan CA TV Corp.*, 458 U.S. 419, 427, 102 S.Ct. 3164, 73 L.Ed.2d 868 (1982). In *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 43 S.Ct. 158, 67 L.Ed. 322 (1922), the Court recognized that there will be instances when government actions do not encroach upon or occupy the property yet still affect and limit its use to such an extent that a taking occurs. In Justice Holmes' well-known, if less than self-defining, formulation, "while property may be regulated to a certain extent, if a regulation goes too far it will be recognized as a taking." *Id.*, at 415, 260 U.S. 393, 43 S.Ct. 158.

Id. at 617. According to the *Palazzolo* court, "government actions [that] do not encroach upon or occupy property yet still affect and limit" use of property are "regulatory taking[s]." *Id.*

Here, Plaintiffs do not demonstrate a physical taking of their raisins by the government. The RAC gains title of Plaintiffs' reserve tonnage raisins by operation of the federal regulation of the Marketing Order. The government does not physically invade Plaintiffs' land to take the raisins, nor does the government take physical possession of the raisins. The reserve tonnage remains in the possession of the handlers. Moreover, the transfer of title is not absolute. Plaintiffs retain an equity interest in their reserve tonnage raisins. Based on these considerations, this Court finds that Plaintiffs have failed to establish that reserve raisin program of the

Marketing Order constitutes a physical taking. *See, Cienega Gardens v. U.S.*, 331 F.3d 1319 (Fed. Cir. 2003) (Loss of 96% of possible rate of return on investment was "compensable regulatory taking" under Fifth Amendment, for precluding participants in government program from prepaying their mortgages after 20 years, and barring them from unregulated rental market and other more lucrative property uses); *c.f., Rose Acre Farms, Inc. v. U.S.* 559 F.3d 1260 (Fed. Cir. 2009) (egg producer did not suffer a compensable regulatory taking when, due to USDA's salmonella regulations, approximately 43% of its table eggs were diverted to the breaker egg market, thus reducing those eggs' market value by approximately 10%).[14] Because there is no physical taking, Plaintiffs' Fifth Amendment claim fails.[15]

---

[14] Although the USDA relies on rulings related to other marketing orders to argue that Plaintiffs have no property interest in their raisins, this Court notes the distinctions between the Raisin Marketing Order and the marketing orders of other commodities. Unlike most of the other marketing orders, the raisin marketing order "effects a direct transfer of title of a producer's 'reserve tonnage' raisins to the government, and it requires physical segregation of the reserve-tonnage raisins held for the government's account." *Evans*, 74 Fed. Cl. at 558. Thus, the government taking under the raisin Marketing Order is distinct and must be considered on its own facts.

[15] Although Plaintiffs do not establish a physical takings claim, Plaintiffs are not without recourse. In addition to a regulatory takings claim, and as fully explained in *Evans*, Plaintiffs have at least three other legal theories they could present to challenge the reserve requirement. 74 Fed. Cl. at 564–65.

D. Whether the JO's dismissal of Plaintiffs' administrative petition was arbitrary, capricious, and contrary to the law

Plaintiffs attempt to challenge the JO's February 8, 2007 order on Plaintiffs' administrative petition fails, as this Court lacks subject matter jurisdiction to consider Plaintiffs' claim. As a Court of limited jurisdiction, this Court must consider whether subject matter jurisdiction exists and dismiss an action if jurisdiction is lacking. *Southern Pacific Transportation Co. v. City of Los Angeles*, 922 F.2d 498, 502 (9th Cir. 1990), *cert. denied*, 112 S. Ct. 382 (1991); *see also*, Fed. R. Civ. P. 12(h) (3) ("If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action.").

Plaintiffs' appeal of the JO's dismissal of Plaintiffs' administrative petition is barred by the statute of limitations. The statutory provision for judicial review of a ruling on a petition to modify a marketing order is 7 U.S.C. 608c(15)(B), which provides:

> The District Courts of the United States . . . in any district in which such handler is an inhabitant, or has his principal place of business, are hereby vested with jurisdiction in equity to review such ruling, *provided a bill in equity for that purpose is filed within twenty days from the date of the entry of such ruling.*

This statute is jurisdictional. *See, Kingman Reef Atoll Investments, L.L.C. v. U.S.*, 541 F.3d 1189, 1996 (9th Cir. 2008); *see also, John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 128 S.Ct. 750, 753–56,

169 L.Ed.2d 591,(2008). Thus, this Court only has jurisdiction to review a handler's 7 U.S.C. § 608c(15)(B) appeal if that appeal is filed within twenty days. The JO issued its decision on February 4, 2008. Plaintiffs initiated this action on October 14, 2008. Accordingly, Plaintiffs' untimely challenge is barred by the statute of limitations and this Court lacks jurisdiction to consider it. *See United States v. Bravo-Diaz*, 312 F.3d 995, 997 (9th Cir.2002) ("It is fundamental to our system of government that a court of the United States may not grant relief absent a constitutional or valid statutory grant of jurisdiction.").[16] Because this Court lacks jurisdiction over Plaintiffs' cause of action related to the 7 U.S.C. 608c(15)(B) petition, this Court must dismiss it, and cannot reach the merits of the parties' arguments.

VI. CONCLUSION AND ORDER

For the foregoing reasons, the Court GRANTS defendant USDA's summary judgment motion and DENIES Plaintiffs' summary judgment motion. The clerk of court is DIRECTED to enter judgment in favor of defendant USDA and against Plaintiffs and to close this action.

---

[16] In addition, Plaintiffs' challenge to the JO's dismissal of Plaintiffs' administrative petition is the subject of a separate action. In that separate action, Plaintiffs' claims were dismissed as untimely. Plaintiffs' appeal of that dismissal order is currently pending.

IT IS SO ORDERED.

Dated: December 9, 2009

/s/ Lawrence J. O'Neill
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

MARVIN D. HORNE, ET AL.,

v.

UNITED STATES DEPARTMENT OF AGRICULTURE,

JUDGMENT IN A CIVIL CASE

CASE NO: **1:08-CV-01549-LJO-SMS**

XX — Decision by the Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

THAT JUDGMENT IS HEREBY ENTERED IN ACCORDANCE WITH THE COURT'S ORDER OF 12/11/2009

Victoria C. Minor
Clerk of Court

ENTERED: **December 11, 2009**

by: /s/ S. Martin
Deputy Clerk

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MARVIN D. HORNE AND LAURA R. HORNE, d.b.a. RAISIN VALLEY FARMS, a partnership, and d.b.a. RAISIN VALLEY FARMS MARKETING ASSOCIATION, a.k.a. RAISIN VALLEY MARKETING, an unincorporated association; MARVIN D. HORNE; LAURA R. HORNE; DON DURBAHN, and the ESTATE OF RENA DURBAHN, d.b.a. LASSEN VINEYARDS, a partnership,

Plaintiffs-Appellants,

v.

UNITED STATES DEPARTMENT OF AGRICULTURE,

Defendant-Appellee.

No. 10-15270

D.C. No. 1:08-cv-01549-LJO-SMS

OPINION

Appeal from the United States District Court
for the Eastern District of California
Lawrence J. O'Neill, District Judge, Presiding

Argued and Submitted
April 14, 2011—Pasadena, California

Filed July 25, 2011

Before: Stephen Reinhardt, Michael Daly Hawkins, and Ronald M. Gould, Circuit Judges.

Opinion by Judge Hawkins

9453

COUNSEL

Brian C. Leighton, Clovis, California, for the plaintiffs-appellants.

Benjamin B. Wagner, United States Attorney, and Benjamin E. Hall, Assistant United States Attorney, Fresno, California, for the defendant-appellee.

OPINION

HAWKINS, Senior Circuit Judge:

This appeal of a United States Department of Agriculture ("USDA") administrative decision asks us to interpret and pass on the constitutionality of a food product reserve program authorized by the Agricultural Marketing Agreement Act of 1937, as

amended, 7 U.S.C. § 601 *et seq.* ("AMAA"), and implemented by the Marketing Order Regulating the Handling of Raisins Produced from Grapes Grown in California, 7 C.F.R. Part 989 ("Raisin Marketing Order" or "the Order"), first adopted in 1949. Farmers Marvin and Laura Horne ("the Hornes"[17]) protest the USDA Judicial Officer's ("JO") imposition of civil penalties and assessments for their failure to comply with the reserve requirements, among other regulatory infractions, contending: (1) they are producers not subject to the Raisin Marketing Order's provisions; (2) even if subject to those provisions, the requirement that they contribute a specified percentage of their annual raisin crop to the government-controlled reserve pool constitutes an uncompensated *per se* taking in violation of the Fifth Amendment; and (3) the penalties imposed for their "self-help" noncompliance with the Raisin Marketing Order violate the Eighth Amendment Excessive Fines Clause. We affirm.

BACKGROUND

I. Regulatory Framework

Raisins and other agricultural commodities are heavily regulated under federal marketing orders

---

[17] Collectively referred to as "the Hornes," the Plaintiffs-Appellants are Marvin and Laura Horne, d/b/a Raisin Valley Farms (a California general partnership), and d/b/a Raisin Valley Farms Marketing Association (a California unincorporated association), together with their business partners Don Durbahn and the Estate of Rena Durbahn, collectively d/b/a Lassen Vineyards (a California general partnership).

adopted pursuant to the AMAA, a Depression-era statute enacted in response to plummeting commodity prices, market disequilibrium, and the accompanying threat to the nation's credit system. 7 U.S.C. § 601 *et seq.*; *see Zuber v. Allen*, 396 U.S. 168, 174-76 (1969); *see generally* Daniel Bensing, "The Promulgation and Implementation of Federal Marketing Orders Regulating Fruit and Vegetable Crops Under the Agricultural Marketing Agreement Act of 1937," 5 *San Joaquin Agric. L. Rev.* 3 (1995). The declared purposes of the AMAA are, inter alia, to help farmers achieve and maintain price parity for their agricultural goods and to protect producers and consumers alike from "unreasonable fluctuations in supplies and prices" by establishing orderly marketing conditions. 7 U.S.C. § 602; *see Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 138 (1963); *Pescosolido v. Block*, 765 F.2d 827, 830 (9th Cir. 1985).

[1] To achieve these goals, the AMAA delegates authority to the Secretary of Agriculture ("Secretary") to issue marketing orders[18] regulating

---

[18] According to the specific promulgation procedures mandated by the AMAA, the Secretary may only issue a marketing order if, after providing notice and opportunity for hearing, he finds that "the issuance of such order . . . will tend to effectuate the declared policy" of the Act. 7 U.S.C. § 608c(3)-(4). Such order will not become effective until approved by both (1) the handlers of at least 50 percent of the volume of the commodity covered by the proposed order and (2) either (a) two-thirds of producers of that commodity during a representative period or (b) producers of two-thirds of the volume of that commodity during said period. *Id.* § 608c(8); *see id.* § 608b. The Secretary may terminate or suspend any marketing order upon finding it "obstructs or does not tend to effectuate the declared policy" of

the sale and delivery of agricultural goods, 7 U.S.C. § 608c, principally by imposing production quotas or by restricting the supply of a commodity for sale on the open market, either through marketing allotments or reserve pools, *see id.* § 608c(6).[19] The Secretary, in turn, is authorized to delegate to industry committees the power to administer marketing orders. 7 U.S.C. § 608c(7)(C); *see* 7 C.F.R. § 989.35 (2006). Marketing orders under the AMAA apply only to "handlers," i.e., those who process and pack agricultural goods for distribution,[20] and do not

---

the Act, or upon request of a majority of active producers during a representative time period. *Id.* § 608c(16).

[19] Section 8c of the AMAA, 7 U.S.C. § 608c, the key statutory provision dealing with the marketing orders, originated in a 1935 amendment to the Agricultural Adjustment Act of 1933, Pub. L. No. 73-10, 48 Stat. 31 ("AAA"). The Supreme Court invalidated parts of the AAA in 1936, *see United States v. Butler*, 297 U.S. 1, 77 (1936), but Congress quickly reenacted most of the AAA's production-control measures in the AMAA, which the Supreme Court subsequently upheld against various constitutional challenges, *see United States v. Rock Royal Co-op, Inc.*, 307 U.S. 533 (1939).

[20] A "handler" under the Raisin Marketing Order is

> (a) [a]ny processor or packer; (b) any person who places, ships, or continues natural raisins in the current of commerce from within [California] to any point outside thereof; (c) any person who delivers off-grade raisins, other failing raisins or raisin residual material to other than a packer or other than into any eligible non-normal outlet; or (d) any person who blends raisins [subject to certain exceptions].

7 C.F.R. § 989.15. A "packer," in turn, is "any person who, within [California], stems, sorts, cleans, or seeds raisins, grades stemmed raisins, or packages raisins for market as raisins," but

apply to any producer "in his capacity as a producer."[21] 7 U.S.C. §§ 608c(1), 608c(13)(B).[22] Any handler who fails to comply with the terms of a marketing order is subject to civil forfeiture, as well as possible civil and criminal penalties. 7 U.S.C. §§ 608a(5), 608a(6), 608c(14) (authorizing civil penalties up to $1,000 for each violation, with each day constituting a separate violation).

The Raisin Marketing Order was originally enacted in 1949, *see* 14 Fed. Reg. 5136 (Aug. 18, 1949) (codified, as amended, at 7 C.F.R. Part 989), in an effort to stabilize raisin prices by controlling production surpluses, which since 1920 had consistently been thirty to fifty percent of each year's

---

does not include a producer who sorts and cleans his own raisins in their unstemmed form. *Id.* § 989.14.

[21] A "producer" under the Raisin Marketing Order is "any person engaged in a proprietary capacity in the production of grapes which are sun-dried or dehydrated by artificial means until they become raisins." 7 C.F.R. § 989.11.

[22] The regulation of handlers, as opposed to growers, appears to be a vestige of the historical context in which the AMAA was enacted, "an era when small, independent growers were frequently left to the mercy of large handlers who could benefit from their market power and position." Bensing, *supra*, at 8. In the raisin industry, producers generally own the land on which the grapevines are located, and they typically pick the grapes and dry them on trays before selling the unstemmed raisins to packers, or "handlers." Packers then prepare the raisins for commercial sale and distribution by cleaning, stemming, seeding, grading, sorting, and packaging the raisins into containers. Packers then typically sell the packed raisins to wholesalers, distributors, and other dealers for resale and distribution to the public. *Brown v. Parker*, 39 F. Supp. 895, 896-97 (S.D. Cal. 1941), *rev'd on other grounds by Parker v. Brown*, 317 U.S. 341 (1943).

crop. *See* Parker, 317 U.S. at 363-64.[23] Like many other fruit and vegetable orders issued under the AMAA,[24] the Order provides for the establishment of annual reserve pools, as determined by each year's crop yield, thereby removing surplus raisins from sale on the open domestic market and indirectly controlling prices. *See* 7 U.S.C. § 608c(6)(E); 7 C.F.R. §§ 989.54(d), 989.65. By February 15 of each year, the Raisin Administrative Committee ("RAC")—an industry committee charged with administration of the Raisin Marketing Order,[25] *see*

---

[23] The raisin industry has long been an important one in California, where 99.5 percent of the U.S. crop and 40 percent of the world's crop are produced. *See* The California Raisin Industry, http://www.calraisins.org/about/the-raisin-industry/ (last visited July 6, 2011). Raisin prices rose rapidly between 1914 and 1920, peaking in 1921 at $235 per ton. This price increase spurred increased production, which in turn caused prices to plummet back down to between $40 and $60 per ton, even while production continued to expand. As a result of this growing disparity between increasing production and decreasing prices, the industry became "compelled to sell at less than parity prices and in some years at prices regarded by students of the industry as less than the cost of production," finally prompting federal government intervention with the Raisin Marketing Order in 1949. *See Parker*, 317 U.S. at 363-64 & nn.9-10.

[24] For a comparison of the Raisin Marketing Order and marketing orders for other agricultural products, such as walnuts, almonds, prunes, tart cherries, and spearmint, see *Evans v. United States*, 74 Fed. Cl. 554, 558 (2006), *aff'd*, 250 Fed. Appx. 321 (Fed. Cir. 2007).

[25] The RAC is currently comprised of forty-seven industry-nominated representatives appointed by the Secretary, of whom thirty-five represent producers, ten represent handlers, one represents the cooperative bargaining association, and one

7 C.F.R. §§ 989.35, 989.36—recommends the "reserve- tonnage" and "free-tonnage" percentages for that year, which the Secretary then promulgates. *See id.* §§ 989.54(d), 989.55. The reserve-tonnage requirement varies from year to year; for example, in the 2002-03 and 2003-04 crop years at issue here, the reserve percentages were set at forty-seven percent and thirty percent of a producer's crop, respectively.

As a result of the Order's reserve program requirements, a producer receives payment (at a pre-negotiated field market price) upon delivery of raisins to a handler only for the free-tonnage raisins, which the handler is then free to sell on the domestic market without restrictions. *See id.* § 989.65. The reserve-tonnage raisins, on the other hand, must be held by the handler in segregated bins "for the account" of the RAC until the RAC sells them to handlers for resale in export markets or directs that they be sold or disposed of in secondary, non-competitive markets, such as school lunch programs, either by direct sale or gift to U.S. agencies or foreign governments. *Id.* §§ 989.54, 989.56, 989.65, 989.67, 989.166, 989.167. The reserve pool sales are used to finance the RAC's administration, and any remaining net proceeds must then be equitably distributed to the producers on a pro rata basis. *See* 7 U.S.C. § 608c(6)(E) (providing for "the equitable distribution of the net return derived from the sale

---

represents the public. *See* 7 C.F.R. §§ 989.26, 989.29, 989.30. The RAC is an agent of the federal government but receives no federal appropriations. Instead, it is funded by assessments levied on handlers per ton of raisins sold on the open market and by proceeds from the sale of reserve-tonnage raisins. *See* 7 C.F.R. §§ 989.53, 989.79, 989.80(a), 989.82.

[of reserve-pool raisins] among the persons beneficially interested therein"); 7 C.F.R. § 989.66(h). Thus, although producers do not receive payment for reserve-tonnage raisins at the time of delivery to a handler, they retain a limited equity interest in the net proceeds of the RAC's disposition of the reserve, to be paid at a later time.

The RAC is tasked with selling the reserve raisins in a manner "intended to maxim[ize] producer returns and achieve maximum disposition of such raisins by the time reserve tonnage raisins from the subsequent crop year are available," 7 C.F.R. § 989.67(d)(1), but the Hornes complain that they have not received any reserve sale proceeds since the mid-1990s. For example the RAC designated forty-seven percent of the 2002-03 crop as reserve tonnage, which it then sold for $970 per ton, but none of the money the RAC received was paid back to the raisin producers.

In addition to the reserve pool requirement, the Raisin Marketing Order obliges handlers to, *inter alia*: file reports with the RAC, pay assessments to the RAC, and grant the RAC access to records for auditing purposes. *See id.* §§ 989.58, 989.59, 989.73, 989.77, 989.80.

II. The Hornes' Raisin Enterprises

Marvin and Laura Horne have been producing raisins in Fresno and Madera Counties in California since 1969 and in 1999 registered as a California general partnership under the name Raisin Valley Farms. They also own and operate Lassen Vineyards, another registered California general partnership, in partnership with Laura's parents,

Don and Rena Durbahn. Disillusioned with a regulatory scheme they deemed "outdated" and exploitive of farmers, the Hornes looked for ways to avoid the Raisin Marketing Order's requirements, particularly its mandatory raisin reserve program. Because those requirements apply only to handlers, the Hornes implemented a plan to bring their raisins to market without going through a traditional middle-man packer. As part of their plan, the Hornes purchased their own equipment and facilities to clean, stem, sort, and package raisins, which they installed on Lassen Vineyards property in 2001. Not only did this facility handle the raisins from Raisin Valley Farms and Lassen Vineyards, it also contracted with more than sixty other raisin growers to clean, stem, sort, and in some cases box and stack their raisins for a per-pound fee, typically twelve cents per pound.[26] USDA records reflect that Lassen Vineyards packed out more than 1.2 million pounds of raisins during the 2002-03 crop year and more than 1.9 million pounds during the 2003-04 crop year.

Meanwhile, the Hornes also organized these sixty-some growers into the Raisin Valley Marketing Association, an unincorporated association that marketed and sold raisins to wholesale customers on its members' behalf, while the growers maintained ownership over their own raisins. Raisin Valley Marketing then held the sales funds on the growers' behalf in a trust account, from which it paid Lassen

---

[26] This type of arrangement is known as "toll packing." Toll packers do not acquire ownership of the commodity but instead provide a packing service for a fee.

Vineyards its packing fees, paid a third-party broker fee, and distributed the net proceeds to the growers.

III. Proceedings Below

The Administrator of the Agricultural Marketing Service initiated an enforcement action against the Hornes, alleging violations of the AMAA and failure to comply with the Raisin Marketing Order's various requirements. On appeal from an Administrative Law Judge's decision following an on-the- record hearing, the USDA JO found both Raisin Valley Farms and Lassen Vineyards liable for: (1) twenty violations of 7 C.F.R. § 989.73 (filing of inaccurate reports); (2) fifty-eight violations of 7 C.F.R. § 989.58(d) (failing to obtain incoming inspections); (3) 592 violations of 7 C.F.R. § 989.66 and 7 C.F.R. § 989.166 (failing to hold reserve raisins for the 2002-03 and 2003-04 crop years); (4) two violations of 7 C.F.R. § 989.80 (failing to pay assessments to the RAC); and (5) one violation of 7 C.F.R. § 989.77 (failing to allow the Agricultural Marketing Service access to records). The JO accordingly ordered the Hornes to pay (1) $8,783.39 in unpaid assessments for the 2002-03 and 2003-04 crop years, pursuant to 7 C.F.R. § 989.80(a); (2) $483,843.53, the alleged dollar equivalent of the withheld raisin reserve contributions for the 2002-03 (632,427 pounds) and 2003-04 (611,159 pounds[27]) crop years, pursuant to 7 C.F.R. § 989.166(c); and (3) $202,600 in civil penalties, pursuant to 7 U.S.C. § 608c(14)(B).

---

[27] The Hornes do not challenge the JO's calculation of these figures.

The Hornes filed this action in district court seeking judicial review of a final agency decision pursuant to 7 U.S.C. § 608c(14)(B).[28] On cross-motions for summary judgment, the district court granted summary judgment for the USDA, and the Hornes timely appealed.

STANDARDS OF REVIEW

A district court's grant of summary judgment is reviewed de novo. *Ariz. Life Coal., Inc. v. Stanton*, 515 F.3d 956, 962 (9th Cir. 2008). Viewing the evidence in the light most favorable to the non-moving party, we must determine whether any genuine issues of material fact remain and whether the district court correctly applied the relevant substantive law. *Lopez v. Smith*, 203 F.3d 1122, 1131 (9th Cir. 2000) (en banc). We review de novo a constitutional challenge to a federal regulation. *Doe v. Rumsfeld*, 435 F.3d 980, 984 (9th Cir. 2006) (citing *Gonzales v. Metro. Transp. Auth.*, 174 F.3d 1016, 1018 (9th Cir. 1999)). We also review de novo whether a fine is unconstitutionally excessive. *United States v. Mackby*, 339 F.3d 1013, 1016 (9th

---

[28] In a separate action not the subject of this appeal, the Hornes filed an administrative petition before the Secretary of Agriculture in March 2007 pursuant to 7 U.S.C. § 608c(15)(A) challenging the Raisin Marketing Order and its application to them. The JO granted the USDA's motion to dismiss for lack of standing. The Hornes filed a complaint in district court, but the district court dismissed it for lack of subject matter jurisdiction because it was not timely filed, and we affirmed. *See Horne v. U.S. Dep't of Agric.*, 395 Fed. Appx. 486 (9th Cir. Sep. 27, 2010) (unpublished).

Cir. 2003) (*citing United States v. Bajakajian*, 524 U.S. 321, 337 n.10 (1998)).

DISCUSSION

I. Application of the Raisin Marketing Order to the Hornes

For the reasons discussed in the district court's opinion below, we conclude that the Hornes, who admit that their toll-packing business "stems, sorts, cleans," and "packages raisins for market as raisins," 7 C.F.R. § 989.14, satisfy the regulatory definition of a "packer" and are thus "handlers" subject to the Raisin Marketing Order's provisions, *see* 7 C.F.R. § 989.15. *See Horne v. U.S. Dep't of Agric.*, 2009 U.S. Dist. LEXIS 115464, at *20-49 (E.D. Cal. Dec. 11, 2009). The USDA's interpretation of its own regulation is not "plainly erroneous or inconsistent with the regulation" and thus must be given "controlling weight." *See Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945); *accord Auer v. Robbins*, 519 U.S. 452, 461 (1997); *Miller v. Cal. Speedway Corp.*, 536 F.3d 1020, 1028 (9th Cir. 2008). Furthermore, its findings regarding the Hornes' handler operations are supported by substantial evidence and are neither arbitrary nor capricious. *See* 5 U.S.C. § 706(2)(A), (E).

[2] The Hornes argue they are statutorily exempt from regulation because they also satisfy the regulatory definition of a "producer," and the AMAA provides that "[n]o order issued under this chapter shall be applicable to any producer in his capacity as a producer." 7 U.S.C. § 608c(13)(B). However, by expressly limiting the exemption from regulation

only to a producer "in his capacity as a producer," the AMAA contemplates that an individual who performs both producer and handler functions may still be regulated in his capacity as a handler. Even if the AMAA is considered "silent or ambiguous" on the regulation of individuals who perform both producer and handler functions, we must give *Chevron* deference to the permissible interpretation of the Secretary of Agriculture, who is charged with administering the statute. *Chevron, USA, Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984); *see* 7 U.S.C. § 608c(1); *see also Morales-Izquierdo v. Dep't of Homeland Sec.*, 600 F.3d 1076, 1086-87 (9th Cir. 2010); *Midway Farms v. U.S. Dep't of Agric.*, 188 F.3d 1136, 1140 n.5 (9th Cir. 1999). Other courts have similarly rejected the Hornes' argument that a producer who handles his own product for market is statutorily exempt from regulation under the AMAA. *See*, e.g., *Freeman v. Vance*, 319 F.2d 841, 842 (5th Cir. 1963) (per curiam); *Ideal Farms, Inc. v. Benson*, 288 F.2d 608, 614 (3d Cir. 1961), *cert. denied*, 372 U.S. 965 (1963); *Evans*, 74 Fed. Cl. at 557-58. Deferring to the agency's permissible interpretation of the statute, as we must, we conclude that applying the Raisin Marketing Order to the Hornes in their capacity as handlers was not contrary to the AMAA.

II. Takings Claim

Does the Raisin Marketing Order's reserve requirement program constitute a physical, per se taking of the Hornes' personal property without just compensation, in violation of the Fifth Amendment? *See* U.S. Const. amend. V ("[N]or shall private property be taken for public use, without just

compensation."). We join the Court of Federal Claims, which not long ago decided this exact question, in holding it does not. *See Evans*, 74 Fed. Cl. at 562-64; *cf. Cal-Almond, Inc. v. United States*, 30 Fed. Cl. 244, 246-47 (1994) (rejecting a takings claim against a similar reserve program under the almond marketing order).

The Fifth Amendment Takings Clause does not itself authorize the taking of private property, nor does it prohibit the government from doing so. Instead, it imposes conditions on the government's authority to act, providing that *when* government takes private property, pursuant to the lawful exercise of its constitutional powers, (1) it must take for public rather than private use, and (2) it must provide owners with just compensation, as measured by the property owner's loss. *See Brown v. Legal Found. of Wash.*, 538 U.S. 216, 231-32, 235-36 (2003); *First English Evangelical Lutheran Church of Glendale v. Cnty. of L.A.*, 482 U.S. 304, 314 (1987). The former condition ensures that government does not abuse its powers by taking private property for another's private gain, *see, e.g., Penn. Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922); the latter ensures that even when government acts in the public interest, it does not "forc[e] some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole," *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

[3] In its earliest days, the Takings Clause was thought to apply only to "direct appropriation of property, or the functional equivalent of a practical ouster of the owner's possession," *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 537 (2005) (internal

quotation marks and brackets omitted), *i.e.*, "physical takings." *See Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1028 n.15 (1992). Over the years, its reach has extended to accommodate the modern reality that "government regulation of private property may, in some instances, be so onerous that its effect is tantamount to a direct appropriation or ouster." *Lingle*, 544 U.S. at 537; *see also Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 427-38 (1982) (surveying evolution of the takings doctrine). Most takings challenges to governmental regulations must undergo an ad hoc, fact-intensive inquiry focusing on (1) the economic impact of the regulation on the claimant; (2) the extent to which the regulation interferes with reasonable investment-backed expectations; and (3) the character of the governmental action. *Penn Cent. Transp. Co. v. N.Y.C.*, 438 U.S. 104, 124 (1978). Only in two situations does the Supreme Court recognize that regulatory action *per se* "goes too far" in frustrating property rights, *Mahon*, 260 U.S. at 415: first, "where government requires an owner to suffer a permanent physical invasion of her property[,] however minor," *Lingle*, 544 U.S. at 538; *see, e.g.*, *Loretto*, 458 U.S. at 438 (compensation required where state law forced landlords to permit cable companies to install cable facilities occupying one and one-half square feet of rooftops); *Kaiser Aetna v. United States*, 444 U.S. 164, 179-80 (1979) (same for imposition of navigational servitude upon private marina); *United States v. Causby*, 328 U.S. 256, 265 & n.10 (1946) (same for physical invasions of airspace); and second, where government regulation "denies all economically beneficial or productive use of land," *Lucas*, 505 U.S. at 1015 (emphasis added)

(compensation required where state law barring construction of any permanent habitable structures on beachfront property rendered land parcels "valueless"). When government action results in such a "total regulatory taking[ ]," *id.* at 1026, as opposed to a mere "partial regulatory taking[ ]," *Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 326 (2002), a property owner is categorically entitled to compensation, without resort to the usual case-specific inquiry.

[4] The Hornes, however, do not claim that the Raisin Marketing Order effects a regulatory taking, partial or total. Instead, they insist we need look no further than the RAC's annual "direct appropriation" of their reserve-tonnage raisins to conclude this is a classic *physical* taking. Though the simplicity of their logic has some understandable appeal—their raisins are personal property, personal property is protected by the Fifth Amendment, and each year the RAC "takes" some of their raisins, at least in the colloquial sense—their argument rests on a fundamental misunderstanding of the nature of property rights and instead clings to a phrase divorced from context.

It is undisputed that the Fifth Amendment guarantees compensation for the taking not only of real property but also of personal property and even intangible property. *See Phillips v. Wash. Legal Found.*, 524 U.S. 156, 172 (1998) (interest earned on lawyers' trust account is a protected private property); *Brown*, 538 U.S. at 235 (same); *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1001-04 (1984) (same for trade secrets). No one suggests the government could come onto the Hornes' farm

uninvited and walk off with forty-seven percent of their crops without offering just compensation, even if the seizure itself were justified (for example, as a wartime measure). *See Dolan v. City of Tigard*, 512 U.S. 374, 384 (1994); *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 831 (1987); *United States v. Pewee Coal Co.*, 341 U.S. 114, 115-17 (1951) (government's wartime seizure and operation of a coal mine to prevent a national coal miners' strike constituted a compensable taking). Certainly, that government action is authorized does not immunize it from a takings claim; indeed, the Takings Clause *presupposes* that the government has taken lawfully. *Lingle*, 544 U.S. at 543; *see Kaiser Aetna*, 444 U.S. at 172 (no "blanket exception" to the Takings Clause simply because Congress has acted under lawful authority). If the Raisin Marketing Order authorized an uninvited, forcible taking of the Hornes' crops, there is no question that the government would have "a categorical duty to compensate the [Hornes], regardless of whether the interest that is taken constitutes an entire parcel [i.e., all their crops,] or merely a part thereof." *Tahoe-Sierra*, 535 U.S. at 322 (internal citation omitted).

[5] But a forcible taking is not what the Raisin Marketing Order accomplishes. Far from compelling a physical taking of the Hornes' tangible property, the Raisin Marketing Order applies to the Hornes only insofar as they voluntarily choose to send their raisins into the stream of interstate commerce. Simply put, it is a use restriction, not a direct appropriation. The Secretary of Agriculture did not authorize a forced seizure of forty-seven percent of the Hornes' 2002-03 crops and thirty percent of their 2003-04 crops, but rather imposed a condition on the

Hornes' *use* of their crops by regulating their sale. As we explained in a similar context over seventy years ago, the Raisin Marketing Order "contains no absolute requirement of the delivery of [reserve-tonnage raisins] to the [RAC]" but rather only "a conditional one." *Wallace v. Hudson-Duncan & Co.*, 98 F.2d 985, 989 (9th Cir. 1938) (rejecting a takings challenge to a reserve requirement under the walnut marketing order).

In rejecting a claim that a local mobile home rent control ordinance amounted to a physical taking of park owners' property interest, the Supreme Court similarly explained that "[t]he government effects a physical taking only where it *requires* the landowner to submit to the physical occupation of his land." *Yee v. City of Escondido*, 503 U.S. 519, 527 (1992) (emphasis in original). Emphasizing that the "'element of required acquiescence is at the heart of the concept of occupation,'" *id.* (*quoting FCC v. Fla. Power Corp.*, 480 U.S. 245, 252 (1987)), the Court explained that the mobile park owners had no physical takings claim because they voluntarily rented their land to mobile home owners and thus acquiesced in the regulation not under government compulsion but of their own accord, *id.* at 527-28. This same logic was used to defeat a takings challenge to a statute authorizing the public disclosure of private data submitted by applicants as a condition on registering their pesticides. *See Ruckelshaus*, 467 U.S. at 1007. Even though the applicants had a recognized interest in their intellectual property, the Supreme Court reasoned that "a voluntary submission of data by an applicant in exchange for the economic advantages of a registration can hardly be called a taking," so long as

the disclosure condition was rationally related to a legitimate government interest and the applicant was made aware of the condition in advance. *Id.*

[6] There are, of course, limits to what conditions the government can constitutionally impose. The government "may not require a person to give up a constitutional right—[for example,] the right to receive just compensation when property is taken for a public use—in exchange for a discretionary benefit conferred by the government where the benefit has little or no relationship to the property." *Dolan*, 512 U.S. at 385. Thus, where the government conditioned the grant of a coastal development permit on the granting of a public easement bearing no nexus to the original purpose of the building restriction, the Supreme Court held that the government could not avoid paying compensation simply by shoehorning a taking into an unrelated exercise of its police powers. *Nollan*, 483 U.S. at 837; *see also Dolan*, 512 U.S. at 395 (holding that city could not require development permit applicant to grant a public pathway easement where there was no reasonable relationship between the proposed development and the condition imposed). Here, however, the condition imposed is rationally related to the government's legitimate interest in controlling the supply of raisins on the domestic market so as to prevent price destabilization and corollary effects on the economy, and the Hornes had ample prior notice of the condition before they voluntarily decided to enter the raisin market.

Nevertheless, the Hornes insist their so-called "volun[illegible]ry" subjection to the Raisin Marketing Order is in fact the product of a Hobson's choice, for they

have no economically viable alternative to selling their raisins and therefore must suffer the complete and total taking of a designated percentage of their raisins under compulsion. Their argument is founded on an erroneous belief that they have a property right to "market their [raisins] free of regulatory controls," *Cal-Almond*, 30 Fed. Cl. at 246, and is unavailing.

Admittedly, the Raisin Marketing Order's expansive definition of "handler," which includes anyone who "packs" raisins for sale even if the raisins are sold exclusively within the state of California, renders its regulatory reach less escapable than the marketing order at issue in *Wallace*, which did not apply to walnuts sold within the state of production. *See Wallace*, 98 F.2d at 989. Nonetheless, we noted in *Wallace* a "distinction between the direct appropriation of property and the destruction of property values in the exercise of governmental power," *id.*, observing that the regulation would remain valid "[e]ven if the [c]ompany were able to show . . . that the only alternative to making delivery to the [government] of surplus walnuts or their 'credit value' would be to go out of business," *id.* at 990.

[7] This seemingly draconian result flows from the long-standing notion that "some [property] values are enjoyed under an implied limitation and must yield" to the government's regulatory powers. *Mahon*, 260 U.S. at 413. The implied restrictions on our property rights "are the burdens we all must bear in exchange for the advantage of living and doing business in a civilized community," *Ruckelshaus*, 467 U.S. at 1007 (internal quotation

marks and citations omitted). Our takings jurisprudence is "guided by the understandings of our citizens regarding the content of, and the State's power over, the 'bundle of rights' that they acquire when they obtain title to property," *Lucas*, 505 U.S. at 1027, and not every restriction on our use of property amounts to a compensable taking.

Although the Fifth Amendment, as previously discussed, protects real and personal property alike, the personal property "bundle of rights" is not coextensive with the bundle comprising real property, as they are informed by different background principles. *See id.* at 1027-30. Consequently, the same government action may effect a taking when applied to one type of property but not the other. Whereas a regulation depriving a landowner of "*all* economically beneficial uses" of his land effects a categorical taking, *see Lucas*, 505 U.S. at 1019 (emphasis in original), the same may not necessarily be true of a regulation banning the sale of a commercial product, *see, e.g., Andrus v. Allard*, 444 U.S. 51, 66-67 (1979) (holding that prohibition on sale of eagle feathers was not a taking); *Ruppert v. Caffey*, 251 U.S. 264 (1920) (upholding sales ban on nonintoxicating alcoholic beverages against takings challenge); *James Everard's Breweries v. Day*, 265 U.S. 545 (1924) (upholding ban on sale of all liquor, including liquor lawfully manufactured before passage of the statute). While the total deprivation of beneficial use of land carries a "heightened risk that private property is being pressed into some form of public service under the guise of mitigating serious public harm," *Lucas*, 505 U.S. at 1018, when it comes to personal property, "the State's traditionally high degree of control over commercial

dealings" ought to put a property owner on notice "of the possibility that new regulation might even render his property economically worthless (at least if the property's only economically productive use is sale or manufacture for sale)," *id.* at 1027-28. Thus, although the right to sell their raisins is a significant one, it is but one "strand" in the Hornes' bundle, and even the destruction of that single strand would not amount to a taking without undergoing Penn Central ad hoc review. *See Andrus*, 444 U.S. at 65-66 ("significant restriction . . . imposed on one means of disposing of the artifacts" does not amount to a taking); *see also Rock Royal*, 307 U.S. at 572 ("As the Congress would have, clearly, the right to permit only limited amounts of milk to move in interstate commerce, . . . it might permit the movement on terms of pool settlement . . . .").

[8] In any event, the Raisin Marketing Order does *not* destroy that strand and does *not* deny raisin farmers all economically beneficial use of their raisins, for the regulation does not ban the sale of raisins altogether but only requires the delivery to the RAC of a certain percentage of raisins prepared for market. The Hornes insist the regulation effects a total taking of those reserve-tonnage raisins, but they ignore the Supreme Court's repeated admonition that we must consider the regulation's impact on "the parcel as a whole" rather than "divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated." *Penn Cent.*, 438 U.S. at 130-131 & n.27; *accord Tahoe-Sierra*, 535 U.S. at 327. For example, where a statute required coal companies to leave unmined fifty percent of their coal beneath certain structures to prevent land

subsidence, the Supreme Court found no taking, reasoning that "[t]he 27 million tons of coal do not constitute a separate segment of property for takings law purposes." *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 498 (1987).

[9] Accordingly, the Hornes' argument that they have suffered a complete and total taking of their reserve-tonnage raisins is squarely foreclosed by case law, for the relevant parcel here is the entirety of their annual crop, not the individual raisins destined for the reserve pool. Even if in absolute terms they number in the billions, the reserve-tonnage raisins are but a designated percentage of a producer's total annual crop handled for sale in the domestic market. Furthermore, the Hornes have put forth no evidence that the Raisin Marketing Order "makes it impossible for [them] to profitably engage in their business." *Id.* at 485. We imagine it would be difficult for the Hornes to gather such evidence, given that the reserve-pool restrictions on the market supply of raisins serve to *raise* prices for the Hornes' free-tonnage raisins, ostensibly making their business *more* profitable than it would be in an unregulated free market.

[10] The Hornes have suffered no compensable *physical* taking of any portion of their crops, and thus the Fifth Amendment poses no obstacle to the Secretary's enforcement of the Raisin Marketing Order against them. Because the Hornes do not advance the alternative theory that the Raisin Marketing Order effects a regulatory taking, we leave that question for another day.

III. Excessive Fines Claim

Finally, in connection with their takings argument, the Hornes protest the JO's imposition of nearly $700,000 in combined assessments and fines, which they believe excessively penalizes them, in violation of the Eighth Amendment, for their justified refusal to deliver their own private property into the hands of the government. *See* U.S. Const. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.").

[11] To prevail on an excessive fines claim, a plaintiff must establish (1) the assessment is imposed, at least in part, for punitive and not merely remedial purposes, and (2) the fine is excessive, or "grossly disproportional to the gravity of [the] offense" for which it is imposed. *Bajakajian*, 524 U.S. at 334; *see Engquist v. Or. Dep't of Agric.*, 478 F.3d 985, 1006 (9th Cir. 2007); *Mackby*, 339 F.3d at 1016. Although an excessive punitive civil fine is not beyond the Eighth Amendment's reach, *Hudson v. United States*, 522 U.S. 93, 103 (1997), civil forfeiture that merely "provides a reasonable form of liquidated damages" as compensation for government losses resulting from the unlawful activity is remedial, not punitive, and accordingly does not implicate the Eighth Amendment, *One Lot Emerald Cut Stones & One Ring v. United States*, 409 U.S. 232, 237 (1972); *see United States v. $273,969.04 U.S. Currency*, 164 F.3d 462, 466 (9th Cir. 1999); *Austin v. United States*, 509 U.S. 602, 622 n.14 (1993) ("[A] fine that serves purely remedial purposes cannot be considered 'excessive' in any event.").

[12] Here, the district court correctly determined that the $8,783.39 in unpaid assessments imposed pursuant to 7 C.F.R. § 989.80(a) and the $483,843.53 in compensation for the withheld reserve-tonnage raisins imposed pursuant to 7 C.F.R. § 989.166(c) amounted to remedial rather than punitive forfeitures and that the Excessive Fines Clause therefore is inapplicable to those penalties. The JO's order that the Hornes pay assessments to the RAC was calculated solely to compensate the RAC for the mandatory assessments not paid. *See* 7 C.F.R. § 989.80(a) ("Each handler shall, with respect to free tonnage acquired by him . . . pay to the committee, upon demand, his pro rata share of the expenses . . . which the Secretary finds will be incurred, as aforesaid, by the committee during each crop year . . . ."). Similarly, the JO's order that the Hornes compensate the RAC for the withheld reserve-tonnage raisins flowed inexorably from another remedial, non-punitive provision of the regulations. *See id.* § 989.166(c) ("A handler who fails to deliver to the Committee, upon request, any reserve tonnage raisins in the quantity and quality for which he has become obligated . . . shall compensate the Committee for the amount of the loss resulting from his failure to so deliver," as determined by a fixed formula.). Calculation of the compensation amount is nondiscretionary and is limited by the extent of the government's loss. *Cf.* $273,969.04, 164 F.3d at 466 (inferring punitive nature of a sanction where it was not limited by the extent of the government's loss and was tied to commission of a crime). The JO's use of the "field price" to calculate the compensatory amount the Hornes owed the RAC for their withheld reserve-tonnage raisins was

consistent with the regulations. *See* 7 C.F.R. § 989.166(c).

[13] The only sanction that implicates the Excessive Fines Clause is the $202,600 fine imposed pursuant to 7 U.S.C. § 608c(14)(B), but we again agree with the district court that this civil penalty, less than one-third the authorized statutory amount, is not "grossly disproportional to the gravity of [the Hornes'] offense." *Bajakajian*, 524 U.S. at 334. Although we have no set formula for determining the proportionality of a given penalty, relevant factors include the severity of the offense, the statutory maximum penalty available, and the harm caused by the offense. *Mackby*, 339 F.3d at 1016; *see also United States v. 3814 NW Thurman St.*, 164 F.3d 1191, 1197-98 (9th Cir. 1999).

We have previously recognized that noncompliance with a marketing order's reporting and reserve requirements are serious offenses that threaten the Secretary's ability to regulate a given market and prevent price destabilization, while also unjustly enriching the offenders who profit from selling their reserve-tonnage goods on the open market. *See Balice v. U.S. Dep't of Agric.*, 203 F.3d 684, 693, 695, 698-99 (9th Cir. 2000) (upholding a fine of $225,500 imposed on an almond handler subject to up to $528,000 in fines for violations of various reporting and reserve requirements). Furthermore, that Congress authorized a much steeper fine ($1,000 for each of the Hornes' 673 separate offenses spanning a two-year period, for a total of $673,000) than what the JO actually imposed, while not dispositive, weighs heavily against finding the fine grossly disproportional to the Hornes' offense, for

"judgments about the appropriate punishment for an offense belong in the first instance to the legislature." *Bajakajian*, 524 U.S. at 336, 339 n.14; *accord Balice*, 203 F.3d at 699.[29] In light of these factors, we cannot say the district court erred in finding the penalties consistent with the Eighth Amendment.[30]

---

[29] Although in *Balice* it appears the JO imposed penalties under only 7 U.S.C. § 608c(14) and not under the regulation's forfeiture provisions, whereas here the JO imposed both, nothing in the statutory or regulatory language seems to preclude simultaneous imposition of remedial and punitive sanctions under the respective provisions. To the contrary, 7 C.F.R. § 989.166(c) expressly provides that compensation for failure to deliver reserve-tonnage raisins "shall be in addition to, and not exclusive of, any or all of the remedies or penalties prescribed in the act" for noncompliance with the act or regulation's requirements, and the Hornes do not challenge the legitimacy of this provision.

[30] We also reject the Hornes' contention that 7 U.S.C. § 608c(14)(B) exempts them from liability for their Raisin Marketing Order violations because in 2007 they filed an administrative petition pursuant to 7 U.S.C. § 608c(15)(A). See 7 U.S.C. § 608c(14)(B) (immunizing from civil penalty any handler who "in good faith and not for delay" files and prosecutes a qualifying administrative petition). First, this argument was already disposed of in one of our earlier decisions, *see Horne*, 397 Fed. Appx. at 486, and is not properly before us now. Moreover, even if the matter were properly before us, it is without merit. Section 608c(14)(B) only immunizes handlers from penalties otherwise incurred during the pendency of their administrative petition; it does not apply retroactively. Therefore, an administrative petition not filed until 2007 cannot immunize the Hornes from fines relating to their conduct in 2002-04.

CONCLUSION

The Hornes are clearly dissatisfied and frustrated with a regulatory scheme they believe no longer serves the interests of the farmers it was designed, in large part, to protect. That being the case, the Hornes may wish to "take their case to the Secretary for a reevaluation of the [Raisin Marketing] Order and the regulations, for although the [Raisin Marketing] Order and the regulations are lawful, plaintiffs and other producers may prevail upon the Secretary to change them in order to better achieve the purpose behind the [AMAA]." *Prune Bargaining Ass'n v. Butz*, 444 F. Supp. 785, 793 (N.D. Cal. 1975), *aff'd sub nom. Prune Bargaining Ass'n v. Bergland*, 571 F.2d 1132 (9th Cir. 1978) (per curiam); *see* 7 U.S.C. § 608c(16) (prescribing mechanism for termination or suspension of marketing orders). Our role, however, is limited to reviewing the constitutionality and not the wisdom of the current regulation. Finding no constitutional infirmity in either the Raisin Marketing Order or the Secretary's application of it to the Hornes, the summary judgment of the district court is **AFFIRMED**.

No. 10-15270

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MARVIN D. HORNE AND LAURA R. HORNE, D.B.A. RAISIN VALLEY FARMS, A PARTNERSHIP, AND D.B.A. RAISIN VALLEY FARMS MARKETING ASSOCIATION, A.K.A. RAISIN VALLEY MARKETING, AN UNINCORPORATED ASSOCIATION; MARVIN D. HORNE; LAURA R. HORNE; DON DURBAHN, AND THE ESTATE OF RENA DURBAHN, D.B.A. LASSEN VINEYARDS, A PARTNERSHIP,

Plaintiffs-Appellants,

v.

UNITED STATES DEPARTMENT OF AGRICULTURE,

Defendant-Appellee.

On Appeal from the United States District Court for the Eastern District of California (O'Neill, J.) Civil Action No. 1:08-cv-01549-LJO-SMS

PETITION FOR PANEL REHEARING OR REHEARING *EN BANC*

Brian C. Leighton
Attorney at Law
701 Pollasky Avenue
Clovis, CA 93612
(559) 297-6190

Michael W. McConnell
Aditya Bamzai
KIRKLAND & ELLIS LLP
655 Fifteenth Street, N.W.
Washington, DC 20005
(202) 879-5000
Counsel for Plaintiffs-Appellants

September 8, 2011

[TABLE OF CONTENTS AND
TABLE OF AUTHORITIES OMITTED]

INTRODUCTION

This case presents the important question whether the federal government may — without complying with the just compensation requirement of the Fifth Amendment to the United States Constitution — physically take a substantial percentage of a farmer's annual raisin crop as a condition for the farmer receiving permission to sell the remainder of his crop on the market.

Under federal Department of Agriculture ("USDA") regulations, "handlers" of raisins are required on a yearly basis to set aside a portion of their raisin crop — known as "reserve-tonnage" raisins — "for the

account" of a committee established by the Department. The committee, known as the Raisin Administrative Committee ("RAC"), then (1) disposes of the reserve-tonnage raisins as it sees fit — often by setting them aside to be sold at a price below the cost of production to the federal government for school lunch and other nutritional programs — and (2) sets compensation for producers as it sees fit. In the two years relevant to this case (2002-2003 and 2003-2004), federal law required handlers to set aside 47 percent and 30 percent of the producer's crop, respectively, as reserve-tonnage raisins. For the 2003-2004 year, the RAC has to this date determined that compensation for reserve-tonnage raisins should be set at precisely zero dollars — *i.e.*, producers are to receive no compensation for the USDA's appropriation of almost one-third of their crop. For the 2002-2003 year, the RAC set a compensation price that is below the cost of producing raisins.

The Takings Clause of the Fifth Amendment to the U.S. Constitution provides that private property shall not "be taken for public use, without just compensation." U.S. Const. amend. V. At its uncontroversial core, the Clause categorically requires just compensation for a permanent physical "invasion" or "occupation" of property, however minor that invasion may be, *see Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), and guarantees compensation not only for the taking of real property, but also personal property, *see Phillips v. Wash. Legal Found.*, 524 U.S. 156 (1998). There is no dispute here that the raisins are personal property under applicable law.

The panel in this case nevertheless failed to invalidate the Raisin Marketing Order because it determined that no physical taking occurs under the regulatory scheme — and that no compensation is required — when "the Raisin Marketing Order applies to the Hornes only insofar as they voluntarily choose to send their raisins into the stream of interstate commerce." Panel Op. (hereafter, "Op.") at 9470 (attached at Tab A). The United States Supreme Court has squarely rejected this very argument. In *Loretto*, the Court held that a cable installation pursuant to a New York law providing that a landlord must permit a cable television company to install its cable facilities upon private property was a physical taking for which just compensation is due under the Fifth Amendment. *See* 458 U.S. at 421. In seeking to defend the law at stake in *Loretto*, the cable company argued that no physical taking had occurred because "the law applies only to buildings used as rental property" and is therefore "simply a permissible regulation of the use of real property." *Id.* at 438-39. Justice Marshall, writing for the Court, flatly rejected this claim:

> It is true that the landlord could avoid the requirements of § 828 by ceasing to rent the building to tenants. But a landlord's ability to rent his property may not be conditioned on his forfeiting the right to compensation for a physical occupation. [Defendant's] broad "use-dependency" argument proves too much. For example it would allow the government to require a landlord to devote a substantial portion of his

> building to vending and washing machines, with all the profits to be retained by the owners of these services and with no compensation for the deprivation of space. It would even allow the government to requisition a certain number of apartments as permanent government offices. The right of a property owner to exclude a stranger's physical occupation of his land cannot be so easily manipulated.

Id. at 439 n.17. The Court notably did not characterize the taking at stake in *Loretto* as a regulatory taking simply because a commercial landlord could avoid the regulation by ceasing to rent his property.

The same analysis applies here. The regulation requiring Petitioners to turn over 47 percent and 30 percent of their property "for the account of" a government committee cannot be recharacterized as a regulatory taking simply because a farmer may supposedly avoid the regulation by ceasing to sell his raisins. The holding in *Loretto* is squarely on point and contradicts the panel's holding. This case thus falls within the uncontroversial core of the Takings Clause. It does not involve regulations that merely control the use of a person's property and thereby reduce its value, as in the Supreme Court's "regulatory takings" cases. It is not even a "physical occupation" case, where the government's agent enters the land, but the owner is otherwise free to enjoy all the other sticks in the bundle of property ownership. Instead, the government takes title to Petitioners' property and uses it for governmental

purposes, such as school lunches, without any pretense of providing the constitutionally mandated compensation. This case cries out for rehearing, either by the panel or the *en banc* Court.

BACKGROUND

A. The Agricultural Marketing Agreement Act of 1937 and the Raisin Marketing Order.

Under the Depression-era Agricultural Marketing Agreement Act of 1937, as amended, 7 U.S.C. § 601 *et seq.* ("AMAA"), USDA heavily regulates certain segments of California's agricultural economy, including the raisin industry. Pursuant to the Act, USDA promulgated the Marketing Order Regulating the Handling of Raisins Produced from Grapes Grown in California. *See* 7 C.F.R. Part 989 ("Raisin Marketing Order" or "the Order"). The Order, which was first adopted in 1949, establishes a food product reserve program.

The Department has promulgated marketing orders for other agricultural products, such as walnuts, almonds, prunes, tart cherries, and spearmint. *See Evans v. United States*, 74 Fed. Cl. 554, 558 (2006) (collecting orders). The Raisin Marketing Order, however, is different from these other marketing orders in two crucial respects: "it effects a direct transfer of title of a producer's 'reserve tonnage' raisins to the government, and it requires physical segregation of the reserve-tonnage raisins held for the government's account." *Id.*; *see also* 7 C.F.R. §§ 989.54, 989.55, 989.65, 989.66.

Under the Order, the RAC and USDA must establish certain raisin tonnage requirements, known as "reserve-tonnage" and "free-tonnage" percentages, which vary from year to year. *Id.* §§ 989.66, 989.166. The percentages are established by (and thus unknown to raisin producers until) February 15 of each crop year, much after producers have expended substantial resources for the production and harvest of their crop for the year. *Id.* §§ 989.21, 989.54(d). Once the percentages are set, "handlers" of raisins must set aside the "reserve-tonnage" requirement "for the account" of the RAC. *Id.* §§ 989.65, 989.66(a), (b)(1). The RAC may require the delivery of the reserve-tonnage raisins to anyone chosen by the RAC to receive them. *See id.* § 989.66(b)(4). Or the RAC may sell reserve-tonnage raisins to handlers for resale in export markets, *see id.* §§ 989.67(c)-(e), or it may simply direct that they be sold or disposed of by direct sale or gift to United States agencies, *see id.* § 989.67(b)(2), foreign governments, *see id.* § 989.67(b)(3), or charitable organizations, *see id.* § 989.67(b)(4).

B. Petitioners and the 2002-2003 and 2003-2004 Raisin Crops.

Marvin and Laura Horne are farmers. They are part of the large raisin industry in California, which produces 99.4 percent of the United States' and 40 percent of the world's raisin crop. Since 1969, they have produced raisins in Fresno and Madera Counties in California. They operate Raisin Valley Farms, a California general partnership, and the Raisin Valley Farms Marketing Association, a California unincorporated association. Along with Laura Horne's father, Don Durbahn, and the Estate

of Rena Durbahn, they also operate Lassen Vineyards, a California general partnership.

Believing themselves not to be "handlers" subject to the Raisin Marketing Order and AMAA, Petitioners did not set aside the reserve-tonnage requirement for 2002-2003 and 2003-2004, the two years relevant to this case. In those two years, USDA required farmers like Petitioners to turn over 47 percent and 33 percent of their raisin crop. *See* http://www.raisins.org/Newsletter/2000_ANNUAL_REPORT/Table10.pdf. Through the reserve-tonnage set-aside, the government obtained, respectively, 22.1 million and 38.5 million pounds of raisins for its own programs in those years alone. *See* http://www.raisins.org/Newsletter/2000_ANNUAL_REPORT/Table06.pdf.

C. Procedural History.

On April 1, 2004, the Administrator of the Agricultural Marketing Service initiated an enforcement action against Petitioners, claiming that they had violated the AMAA by purportedly failing to comply with the Raisin Marketing Order's various requirements. According to the USDA, Petitioners, who are producers of raisins, became "handlers" subject to the reserve requirements upon their marketing of their own produced raisins. An Administrative Law Judge in the USDA agreed. On appeal from that decision, a USDA Judicial Officer found Petitioners liable for various regulatory violations. Of particular relevance here, the Judicial Officer determined that Petitioners violated 7 C.F.R. § 989.66 and 7 C.F.R. § 989.166 by failing to hold reserve raisins for the 2002-2003 and 2003-2004 crop years.

The Judicial Officer then ordered certain forfeitures and penalties for Petitioners' failure to acquiesce in the USDA's taking of their property. Specifically, the Judicial Officer ordered Petitioners to pay $483,843.53, the alleged dollar equivalent of the withheld raisin reserve contributions for the 2002-2003 (632,427 pounds) and 2003-2004 (611,159 pounds) crop years, as determined by the "field price" typically paid to producers for free-tonnage raisins in those years. 7 C.F.R. § 989.54(b). The Judicial Officer also ordered Petitioners to pay $8,783.39 in unpaid assessments pursuant to 7 C.F.R. § 989.80(a), and an additional $202,600 in civil penalties pursuant to 7 U.S.C. § 608c(14)(B).

Petitioners filed this action in district court seeking judicial review of a final agency decision pursuant to 7 U.S.C. § 608c. Petitioners challenged USDA's imposition of civil forfeitures, penalties, and assessments for their failure to comply with the reserve requirements, among the other asserted regulatory infractions, contending in relevant part that the requirement that they contribute a specified percentage of their annual raisin crop to the government-controlled reserve pool is an uncompensated *per se* taking in violation of the Fifth Amendment. Petitioners also argued that (1) they are producers, not handlers, subject to the Raisin Marketing Order; and (2) the penalties imposed upon them violate the Eighth Amendment's Excessive Fines Clause. The district court granted summary judgment for the USDA. *See Horne v. Dep't of Agriculture*, No. CV-F-08-1549, 2009 WL 4895362 (E.D. Cal. Dec. 11, 2009).

Petitioners appealed, but on July 25, 2011, a panel of this Court affirmed the judgment in its entirety. In doing so, the panel admitted that the argument that a farmer must receive just compensation for a government appropriation of raisins "has some understandable appeal." Op. at 9469. The panel recognized that the "raisins are personal property, personal property is protected by the Fifth Amendment, and each year the RAC 'takes' some of their raisins, at least in the colloquial sense." *Id.* And the panel acknowledged that "the government could [not] come onto the Hornes' farm uninvited and walk off with forty-seven percent of their crops without offering just compensation." *Id.* at 9469-70. The panel nevertheless concluded that USDA "did not authorize a forced seizure of forty-seven percent of the Hornes' 2002-03 crops and thirty percent of their 2003-04 crops, but rather imposed a condition on the Hornes' *use* of their crops by regulating their sale." *Id.* at 9470. This timely petition follows.

ARGUMENT

REHEARING IS WARRANTED BECAUSE THE PANEL OPINION CONFLICTS WITH BINDING PRECEDENT ON IMPORTANT QUESTIONS OF LAW.

It is well-settled that a "minor but permanent physical occupation of an owner's property authorized by government constitutes a 'taking' of property for which just compensation is due under the Fifth [Amendment]." *Loretto*, 458 U.S. at 421. The panel opinion affirming the grant of summary judgment in the government's favor turns this principle of takings law on its head. The panel

attempts to shoehorn this case into the forgiving constitutional test applicable to regulatory takings, which applies when regulations limit a property owner's use of his or her property. But this is not a regulatory takings case. It is an out-and-out compelled transfer of ownership. The government demands that raisin producers give a government committee ownership over a hefty proportion of the producers' crop, and the committee uses the raisins for its own purposes (such as for federal school lunch programs). The Takings Clause was adopted precisely to protect against such compelled transfers of property.

1. The principles of takings law applicable to this case are straightforward and uncontroversial. "[A] permanent physical occupation authorized by government is a taking without regard to the public interests that it may serve." *Loretto*, 458 U.S. at 426. That principle applies with equal force where a property owner could avoid the taking by ceasing to rent (or sell) his property, because an owner's ability to sell property "may not be conditioned on his forfeiting the right to compensation for a physical occupation." *Id.* at 439 n.17. By contrast, when the government merely regulates the use of property, compensation is required only if the purpose of the regulation or the extent to which it deprives the owner of the economic use of the property suggest that the regulation has unfairly singled out the property owner to bear a burden that should be borne by the public as a whole. *See, e.g., Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 123-25 (1978).

For both real and personal property, "possession, control, and disposition are . . . valuable rights that inhere in the property." *Phillips*, 524 U.S. at 170; *Hodel v. Irving*, 481 U.S. 704, 717 (1987); *see also Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 837 (1987) (holding that the Takings Clause protects the right to build on real property from excessive land-use regulation). Even though the government may in some circumstances have the authority to prohibit the sale of personal property, "it is crucial" for the constitutionality of such a prohibition that property owners "retain the rights to *possess* and transport their property." *Andrus v. Allard*, 444 U.S. 51, 66 (1979) (emphasis added).

The Eleventh Circuit's application of these principles in *Gulf Power* is instructive. Like *Loretto*, *Gulf Power* squarely conflicts, and cannot be reconciled, with the panel's reasoning. The Eleventh Circuit rejected the argument that a telecommunications provision did not effect a physical takings because plaintiffs "could avoid the effect of the Act by refraining from using their poles, ducts, conduits, and rights-of-way for wire communications." 187 F.3d at 1331. As the court flatly explained, "this argument is foreclosed by *Loretto*," which holds that "[t]he protection against a permanent, physical occupation of one's property does not hinge on the choice of use for that property." *Id.*

The same result is warranted here, for the same reason. Indeed, a panel of this Court has previously reached the same holding, albeit in a case later abrogated on other grounds by the Supreme Court. *See Hall*, 833 F.2d at 1277-78 (holding that *Loretto*

"gave short shrift" to "the notion that the physical occupation is not permanent" where a property owner can avoid a taking "by going out of business"), *abrogated on other grounds*, *Yee*, 503 U.S. at 525-26.

2. The panel opinion ignores *Loretto*'s categorical holding regarding *physical* takings, instead analogizing this case to two cases involving *regulatory* takings, *Yee* and *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984). *See* Op. at 9471. According to the panel, *Yee* and *Ruckelshaus* stand for the proposition that property owners have "no physical takings claim" where "they *voluntarily*" engage in activity and "thus acquiesce[] in the regulation not under government compulsion but of their own accord." *Id.* As a result, in the panel's view, because Petitioners voluntarily sell raisins, they have acquiesced in the government's appropriation of half their harvest under *Yee* and *Ruckelshaus*.

But neither case says that. *Yee* did not involve a compelled transfer of ownership to the government, but merely a rent control scheme, which is a classic economic regulation. *See* 503 U.S. at 524-25. The petitioners, owners of a mobile home park, attempted to cast the ordinance as a "physical occupation" on the ground that the renters occupied their land and were the beneficiaries of a wealth transfer. The Supreme Court responded, logically enough, that because the mobile home park owners voluntarily leased space to the renters, they could not claim that the physical occupation was caused by the government. As the Court put it, the rent control ordinance was not a physical taking because, unlike the law in *Loretto*, it did not "*require*[] the landowner to submit to the physical occupation of his land," *id.*

at 527, although "[a] different case would be presented were the statute, on its face or as applied, to compel a landowner over objection to rent his property or to refrain in perpetuity from terminating a tenancy," *id.* at 528. The only governmentally-imposed restriction was the rent control. Here, by contrast, a government agency actually takes title to Petitioners' property and does not pay just compensation for it.

The *Yee* Court's statements that "Petitioners voluntarily rented their land to mobile home owners" and "Petitioners' tenants were invited by petitioners, not forced upon them by the government" thus have no application this case. *Id.* at 527-28. These statements do not purport to give the government free reign over the mobile home park so long as its owners "voluntarily" engaged in the mobile home business. Nothing in *Yee*, for example, suggests that the government could require mobile home park owners to devote some portion of their land to government office space or to free housing for the public. To the contrary, *Yee* not only reaffirmed the holding in *Loretto*, but also reaffirmed the *very language* in footnote 17 of *Loretto* that squarely contradicts the panel's holding. *See id.* at 531-32 (quoting footnote 17 with approval); *see also Cwynar v. City & Cnty. of San Francisco*, 90 Cal. App. 4th 637, 658 (2001) (observing that *Yee* "expressly affirmed" this holding in *Loretto*). As *Yee* explained, "Had the city required such [a physical] occupation, of course, petitioners would have a right to compensation, and the city might then lack the power to condition petitioners' ability to run mobile home parks on their waiver of this right." 503 U.S. at 532.

No less importantly, *Yee*'s statement that a "different case would be presented were the statute . . . to compel a landowner over objection . . . to refrain in perpetuity from terminating a tenancy" makes little sense under the panel's interpretation of the case. Why, under the panel's interpretation, could the government not force mobile park owners to "refrain in perpetuity from terminating a tenancy" given that those owners had voluntarily chosen to engage in the business? The fact that the panel's interpretation of *Yee* creates an internal contradiction within the opinion abundantly confirms that the panel's interpretation is wrong.

Nor does *Ruckelshaus* support the panel's holding. Indeed, no party in *Ruckelshaus* even suggested that the appropriation at issue there — which involved a statute requiring disclosure of a trade secret — was a physical taking. The Court did not mention the concept of physical takings or cite *Loretto*. There is thus no indication that the Court intended to upend the clear holding that it had announced in *Loretto* only two years earlier. To the contrary, *Ruckelshaus* turned upon the Court's holding that "Monsanto could not have had a reasonable, investment-backed expectation that EPA would keep the data confidential," 467 U.S. at 1006, a test that has no application in the context of *per se* takings. *See Loretto*, 458 U.S. at 432; *Palazzolo v. Rhode Island*, 533 U.S. 606, 628 (2001). The Panel's observation that "the Hornes had ample prior notice of the condition before they voluntarily decided to enter the raisin market" is therefore entirely misplaced. Op. at 9472. *Ruckelshaus* is inapposite.

3. In addition to its mistaken reliance on *Yee* and *Ruckelshaus*, the panel opinion fails to recognize that the proposition that a regulation may deprive an owner of all economically beneficial uses of his personal property does *not* support compelled transfer of personal property from an owner to the government. The panel opinion cites *Andrus* for this proposition *see* Op. at 9473, but *Andrus* says the opposite. In upholding a regulation that prohibited the sale of eagle feathers under an environmental statute (thereby depriving the feathers' owners of their ability to earn any money from those feathers), *Andrus* said that "[t]he regulations challenged here do not compel the surrender of the artifacts, and there is no physical invasion or restraint upon them. Rather a significant restriction has been imposed on one means of disposing of the artifacts." 444 U.S. at 65. The Court's opinion thus upheld the government's ability to prohibit the sale of an article, not the government's ability to appropriate an article for its own use. As the Court emphasized, "it is crucial that appellees retain the rights to *possess* and transport their property." *Id.* at 66 (emphasis added).

By contrast, here, as the panel opinion recognizes, the Department's regulations deprive Petitioners of their right to possess, or to use in any meaningful sense, their own property. Indeed, those regulations require Petitioners to relinquish title of the reserve-tonnage raisins to the RAC — precisely the scenario that the Court in *Andrus* took pains to distinguish. Unlike *Andrus*, this case involves not only a prohibition on sale (of a product, eagle feathers, that no owner makes investments to produce), but a forced transfer of property in whose production

Petitioners, and other raisin farmers, invest millions of dollars.

It is therefore utterly irrelevant that the Raisin Marketing Order "does not deny raisin farmers all economically beneficial use of their raisins," because it allows farmers to keep some portion of their raisin crop in any given year. Op. at 9474. This principle has no application in the context of *per se* takings. As the Supreme Court has explained, "When the government physically takes possession of an interest in property for some public purpose, it has a categorical duty to compensate the former owner, . . . regardless of whether the interest that is taken constitutes an entire parcel or merely a part thereof." *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 322 (2002). That is why courts "do not ask whether a physical appropriation advances a substantial government interest or whether it deprives the owner of all economically valuable use." *Id.* at 323. On this issue, too, the panel opinion ignores directly controlling precedent, relying instead on a strained analogy to cases addressing regulations that reduced the economic value of property. But the panel opinion cites no case allowing the government to "take" a percentage of a person's property in the form of a transfer of title from the person to the government.

4. At the end of the day, it is important to keep in mind precisely what the panel opinion authorizes here — the appropriation without just compensation of almost fifty percent of Petitioners' raisin harvest from 2002-2003 and approximately one-third of the harvest from 2003-2004. (Indeed, without any

compensation whatsoever for the 30 percent appropriation in 2003-2004.) If the panel opinion here stands, then USDA may require farmers in innumerable agricultural sectors to hand over fifty percent of their annual crop to the government for access to commercial markets — affecting billions of dollars of commerce. Indeed, the panel opinion forthrightly acknowledges that its holding leads to a "seemingly draconian result" for independent farmers such as the Petitioners here. Op. at 9472.

More broadly, the principle announced in the panel opinion has sweeping ramifications for the stability of property rights within this Circuit. Under the panel opinion, almost every physical taking of property can be recharacterized as a regulatory taking, because almost every kind of property is owned for use in some fashion. Thus, under the panel opinion, the government can require a manufacturer of microchips to turn over 50 percent of its manufactured goods for government use, if the manufacturer sells those chips in interstate commerce. The government can require a landlord to turn over half of his real property for use as government office space, if the property is rented. This is precisely the parade of horribles that the Supreme Court sought to avoid by adopting the *per se* physical takings rule in *Loretto*. *See* 458 U.S. at 439 n.17 (rejecting the cable company's argument in part because "[i]t would even allow the government to requisition a certain number of apartments as permanent government offices"). The physical takings doctrine announced in *Loretto* — which is at the very core of the Takings Clause — is all but a dead letter if the Raisin Marketing Order is constitutional and the government may require a

farmer to hand over fifty percent of a crop as an entry fee to participation in the market.

CONCLUSION

For these reasons, this Court should grant panel rehearing or rehearing *en banc*.

Respectfully submitted,

Brian C. Leighton
Attorney at Law
701 Pollasky Avenue
Clovis, CA 93612
(559) 297-6190

/s/ Michael W. McConnell
Michael W. McConnell
Aditya Bamzai
KIRKLAND & ELLIS LLP
655 Fifteenth Street, N.W.
Washington, DC 20005
(202) 879-5000
Counsel for Plaintiffs-Appellants

September 8, 2011

[CERTIFICATE OF COMPLIANCE AND CERTIFICATE OF SERVICE OMITTED]

No. 10-15270

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MARVIN D. HORNE AND LAURA R. HORNE, D.B.A. RAISIN VALLEY FARMS, A PARTNERSHIP, AND D.B.A. RAISIN VALLEY FARMS MARKETING ASSOCIATION, A.K.A. RAISIN VALLEY MARKETING, AN UNINCORPORATED ASSOCIATION; MARVIN D. HORNE; LAURA R. HORNE; DON DURBAHN, AND THE ESTATE OF RENA DURBAHN, D.B.A. LASSEN VINEYARDS, A PARTNERSHIP,

Plaintiffs-Appellants,

v.

UNITED STATES DEPARTMENT OF AGRICULTURE,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA
No. 1:08-CV-01549-LJO-SMS

OPPOSITION TO PETITION FOR REHEARING AND REHEARING EN BANC

TONY WEST
Assistant Attorney General

BENJAMIN W. WAGNER
United States Attorney

MICHAEL S. RAAB
KELSI BROWN CORKRAN
(202) 514-3159
Attorneys, Appellate Staff
Civil Division, Room 7216
950 Pennsylvania Ave., NW
Washington, DC 20530

[TABLE OF CONTENTS AND TABLE OF AUTHORITIES OMITTED]

INTRODUCTION AND SUMMARY

The Agricultural Marketing Agreement Act of 1937 ("AMAA"), 7 U.S.C. §§ 601 *et seq.*, was enacted during the Depression, with the objective of helping farmers obtain a fair value for their products. *See Pescosolido v. Block*, 765 F.2d 827, 828 (9th Cir. 1985); 7 U.S.C. § 602 (2000). The AMAA "contemplates a cooperative venture" among the Secretary of Agriculture, farmers, and the "handlers" who market agricultural goods, "the principal purposes of which are to raise the price of agricultural products and to establish an orderly

system for marketing them." *Block v. Community Nutrition Inst.*, 467 U.S. 340, 346 (1984). To achieve these goals, the Secretary promulgates "marketing orders" that regulate the sale of commodities that are particularly vulnerable to market fluctuations. The marketing order for raisins was issued in 1949, following a spike in production that resulted in a price drop from $235 per ton to $40-$60 per ton. *See* Op. 9461 n.7. The order stabilizes prices by providing for the establishment of annual reserve pools, determined by each year's crop yield, thus decreasing the supply of raisins on the open domestic market. *See* 7 U.S.C. § 608c(6)(E); 7 C.F.R. §§ 989.54(d), 989.65.

The marketing order regulates "handlers" of California raisins — i.e., the entities that process raisins for market distribution. Under the order, handlers set aside a "reserve pool" that may not be sold on the open domestic market. The reserve pool is managed by a committee of industry-nominated representatives appointed by the Secretary. *See* 7 C.F.R. §§ 989.26, 989.29, 989.30. Every year, the committee reviews the crop yield and recommends to the Secretary what portion should be withheld from the open market. *See id.* §§ 989.54(d), 989.65. If the recommendation is approved by two-thirds of farmers (or by the farmers who produced two-thirds of the crop) and the handlers of at least fifty percent of the crop, the Secretary promulgates a regulation fixing the percentage of "reserve" raisins for that year. 7 U.S.C. §§ 608c(8), (9)(B)(i)-(ii); 7 C.F.R. §§ 989.55, 989.65. All reserve raisins are delivered to the committee, which may then sell them in secondary, non-competitive markets. *See* 7 C.F.R. §§ 989.65, 989.66(a), (b)(1), (b)(4). Farmers receive

direct payment, at a pre-negotiated field market price, for the raisins made available for sale on the open market. *See Lion Raisins, Inc. v. United States*, 416 F.3d 1356, 1360 (Fed. Cir. 2005). For the reserve raisins, farmers receive an equity interest which entitles them to an equitable distribution of the net proceeds from the reserve pool sales. *See* 7 C.F.R. § 989.66(h).

In 2002, plaintiffs undertook a production scheme that they believed would allow them to sell raisins without becoming "handlers" subject to the marketing order, thus side-stepping the regulatory framework described above. Disagreeing with plaintiffs' characterization of their business, the Administrator of the United States Department of Agriculture ("USDA") Agricultural Marketing Service initiated an enforcement action against plaintiffs, alleging numerous statutory and regulatory violations. Plaintiffs were found liable for, among other things, failing to comply with the reserve requirements, and ordered to pay over $600,000 in fines and assessments. *See* Op. 9464-65.

Plaintiffs filed suit in the United States District Court for the Eastern District of California, seeking review of the agency's final decision pursuant to 7 U.S.C. § 608c(15)(B). Plaintiffs argued that the agency erred in concluding that plaintiffs were "handlers" subject to the AMAA and raisin marketing order. Plaintiffs also argued that the imposed fines violated the Eighth Amendment, and that the raisin reserve requirement constitutes a per se, physical taking of property without just compensation, in violation of the Fifth Amendment.

The district court granted summary judgment in favor of the government, and a unanimous panel of this Court affirmed. Plaintiffs now seek rehearing with respect to the panel's rejection of their Takings Clause claim.

The panel's decision sets forth the narrow and correct holding that the raisin reserve program did not subject plaintiffs to a "physical, per se taking" for which they are automatically entitled to compensation.

Although not before the panel, a serious jurisdictional problem exists with respect to plaintiffs' taking claim which at the very least counsels against rehearing en banc. Where, as here, the individual asserting a government taking may seek compensation under the Tucker Act, the claim must be brought in the Court of Federal Claims in the first instance.

Plaintiffs have also failed to identify any basis for reconsidering the panel's decision on the merits. Plaintiffs' petition turns almost entirely on their assertion that their claim is controlled by the "per se, physical taking" rule announced in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). In so arguing, plaintiffs gloss over crucial differences between this case and *Loretto*, which involved the permanent physical occupation of land owned by the plaintiff. Neither the Supreme Court nor this Court nor any other court of appeals has suggested that a physical, per se taking may be found with regard to personal property that the government never attempted to physically possess, and for which the plaintiff had no historically rooted expectation of an unfettered property right.

Moreover, more recent Supreme Court decisions make clear that the *Loretto* rule does *not* apply to regulations that condition particular uses of private property on the transfer of some portion of that property to the government. And the panel's decision is consistent with over seventy years of federal court decisions rejecting takings challenges to the agricultural supply controls promulgated under the AMAA, including a recent decision by the Court of Federal Claims reaching exactly the same conclusion as the panel with regard to the raisin reserve requirement, *see Evans v. United States*, 74 Fed. Cl. 554 (2006).

Finally, plaintiffs have failed to explain why the raisin marketing order effectuates an unconstitutional taking when the order is promulgated (and approved by a vote of producers and handlers) for the express purpose of *increasing* the amount of money plaintiffs and other raisin farmers receive for their products.

ARGUMENT

In general, whether a regulatory requirement constitutes a compensable taking turns on a fact-intensive inquiry considering (1) the economic impact of the regulation on the claimant; (2) the extent to which the regulation interferes with reasonable investment-backed expectations; and (3) the character of the governmental action. *See Penn Cent. Transp. Co. v. N.Y.C.*, 438 U.S. 104, 124 (1978). Plaintiffs have not attempted to demonstrate a regulatory taking pursuant to these factors. Instead, plaintiffs argue that the raisin reserve program should be deemed a "per se, physical" taking

pursuant to the Supreme Court's decision in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), categorically entitling them to compensation regardless of the factors above. This Court correctly rejected that argument, and plaintiffs have provided no basis for rehearing of that decision.

The USDA has not physically taken or attempted to physically take plaintiffs' raisins, and has no plans to physically take plaintiffs' raisins in the future. Plaintiffs' suit challenges the USDA's imposition of fines based on plaintiffs' failure to comply with the regulatory scheme controlling the sale of California raisins on the open domestic market. Plaintiffs are free to challenge that regulatory scheme as unconstitutional under the Takings Clause, but they misunderstand how such a challenge should proceed and the manner in which it must be analyzed.

1. As an initial matter, it is does not appear that plaintiffs have asserted a takings claim that this Court has jurisdiction to adjudicate. The Supreme Court has explained that the Fifth Amendment does not prohibit the government from taking private personal property, but instead "places a condition on the exercise of that power," *First English Evangelical Lutheran Church of Glendale v. Los Angeles Co.*, 482 U.S. 304, 314 (1987), namely that the government "provide[] an adequate process for obtaining compensation," *Williamson Co. Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 194 (1985). Congress has provided that compensation process through the Tucker Act, 28 U.S.C. § 1491, which allows parties to bring suit seeking compensation from the government for a taking in the United States Court of Federal Claims. *See Ruckleshaus v.*

Monsanto Co., 467 U.S. 986, 1016 (1984). Accordingly, a takings claim "must be brought to the Court of Federal Claims in the first instance, unless Congress has withdrawn the Tucker Act grant of jurisdiction in the relevant statute." *Eastern Enterprises v. Apfel*, 524 U.S. 498, 520 (1998) (plurality opinion).

Nothing in the AMAA precludes a Tucker Act claim for an alleged taking under a marketing order, and plaintiffs therefore "clearly are entitled" to bring such a claim. *Bay View, Inc. v. Ahtna, Inc.*, 105 F.3d 1281, 1285 (9th Cir. 1997); *see also Preseault v. Interstate Commerce Comm'n*, 494 U.S. 1, 12 (1990). Where, as here, the complaining party may seek compensation for the alleged taking pursuant to the Tucker Act, "[a] takings claim is premature until the plaintiffs have exhausted their rights under [that] Act. This restriction is jurisdictional. The simple fact is that we have no jurisdiction to address the merits of takings claims where Congress has provided a means for paying compensation for any taking that might have occurred." *Consejo de Desarrollo Economico de Mexicali v. United States*, 482 F.3d 1157, 1172 (9th Cir. 2007) (internal quotation omitted); see also *Gordon v. Norton*, 322 F.3d 1213 (10th Cir. 2003).

Plaintiffs contend that their refusal to comply with the regulatory scheme was justified as a "self help" measure against an unconstitutional taking of their property. Appellants' Br. 6. As just explained, however, the government does not violate the Fifth Amendment when it takes private property, so long as it provides a process for obtaining just compensation. If plaintiffs believed that their

compliance with the raisin marketing order would result in a taking of their property, their recourse was to seek compensation for that taking in the Court of Federal Claims.

Indeed, the Court of Federal Claims already adjudicated exactly such a claim in *Evans v. United States*, 74 Fed. Cl. 554 (Ct. Fed. Cl. 2006). To be sure, plaintiffs might prefer to avoid *Evans'* holding that the raisin reserve requirement should be analyzed as a regulatory taking rather than a per se taking. But plaintiffs cannot properly ask this Court to decide the hypothetical question whether the raisin marketing order would amount to an unconstitutional taking were it not compensable under the Tucker Act. This Court has "no authority" to speculate about such matters. *See Bay View*, 105 F.3d at 1286.

Although this jurisdictional issue was not presented to the panel, it is "well-established . . . that the parties may not waive subject-matter jurisdiction and that, therefore, such a claim may be raised at any point in the litigation." *Escobar Ruiz v. INS*, 813 F.2d 283, 286 n.3 (9th Cir. 1987); *see also, e.g., Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 93 (1998). At the very least, this issue counsels strongly against rehearing en banc of the merits question raised in plaintiffs' petition.

2. As the panel unanimously recognized, plaintiffs' takings argument also fails on the merits. The centerpiece of plaintiffs' petition is that the panel did not correctly apply the standard for per se, physical takings announced in *Loretto*. The plaintiff in *Loretto* challenged a law requiring a landlord to permit cable companies to install facilities on rental

buildings. *See* 458 U.S. at 423. Under these circumstances, the Supreme Court held, "[the] permanent physical occupation [of plaintiff's building] is a government action of such a unique character that it is a taking without regard to other factors that a court might ordinarily examine." *Id.* At 432.

Plaintiffs' argument for rehearing turns entirely on their characterization of the *Loretto* rule as a "categorical holding regarding *physical* takings" that applies to their claim. Pet. 14. But *Loretto* involved the permanent physical occupation of an indivisible piece of land to which the plaintiff had title. Describing its decision as "very narrow," the Court specifically tied its holding to the "historically rooted expectation" that property owners have an exclusive right to occupy their land, and that any interference with that right will be compensated. *Loretto*, 458 U.S. at 441; *see also, e.g.*, *id.* at 430 n.7 ("Early commentators viewed a physical occupation of real property as the quintessential deprivation of property."); *id.* at 427 ("When faced with a constitutional challenge to a permanent physical occupation of real property, this Court has invariably found a taking."). Neither *Loretto*'s language nor its reasoning governs this case.

First, plaintiffs' assertion of a "permanent physical occupation" strains the phrase beyond its meaning. Even if the government had actually taken title to plaintiffs' raisins, the government would not have "physically occup[ied]" the raisins. *See* Black's Law Dictionary 1184 (9th ed. 2009) (defining "occupation" as "the possession, control, or use of real property"). Given that plaintiffs *kept* the raisins at issue, they

cannot possibly claim that their challenge is to a permanent, physical occupation within the meaning of *Loretto*. At most, they seek an *extension* of *Loretto* to their claim, based on the fact that the raisins are physical property. But such an extension would make no sense in a case where the plaintiffs cannot demonstrate that the government actually attempted to take their property without compensation. Plaintiffs in this case challenge a fine they incurred because they sold their raisins on the open domestic market without complying with the applicable regulatory regime. Plaintiffs cannot demonstrate that they are owed compensation for a physical taking, because no physical taking ever occurred. And they cannot demonstrate that they lawfully resisted an unconstitutional taking, because the Tucker Act provided plaintiffs with a vehicle for obtaining any compensation to which they may have been entitled, had they complied with the regulatory regime.

Moreover, even if plaintiffs had presented this Court with a claim for an actual taking of their physical property without compensation, an extension of *Loretto* would be inappropriate because plaintiffs cannot demonstrate any "historically rooted expectation of compensation" for the conduct they challenge. *Loretto*, 458 U.S. at 441. As the Supreme Court explained in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1027 (1992), takings jurisprudence is "guided by the understandings of our citizens regarding the content of, and the State's power over, the 'bundle of rights' that they acquire when they obtain title to property." The Court has specifically recognized "the State's traditionally high degree of control over commercial dealings" involving

personal property, *id.* at 1027, an observation that is nowhere more apt than in the context of agricultural commodities. The government's extensive use of price and supply controls to stabilize particular agricultural markets dates back to the Depression, and the raisin marketing order itself has been in place for over sixty years. *See* Op. 9458, 9461. Plaintiffs could not have entered the raisin industry with the expectation that they would be able to freely market their raisins without regard to this regulatory regime, and they certainly could not have expected that they would be able to enjoy the artificially inflated prices created by the raisin reserve program without participating in that program themselves.

Plaintiffs do not cite a single Supreme Court or Ninth Circuit case applying the *Loretto* rule to personal property, let alone to personal property that the government never attempted to possess, and for which the plaintiff had no reasonable expectation of an unfettered property right. Although some other courts of appeals have found particular personal property takings to constitute "physical, per se takings," they have only done so in cases that arguably fit within *Loretto*'s reasoning and language. In *Nixon v. United States*, 978 F.2d 1269 (D.C. Cir. 1992), for example, the D.C. Circuit agreed with former President Nixon that the government's possession of his presidential papers constituted a per se, physical taking. In so holding, the court of appeals did not hold that *all* personal property falls under the *Loretto* rule, but that the rule need not "be limited to real property." *Id.* at 1285. In President Nixon's case, the government had actually taken "complete possession" of his papers, *id.* at 1271

(internal quotation omitted), contrary to the expectation "since the beginning of the Republic," that a President's papers are his private property, *id.* at 1276-84.

Likewise, in *Gulf Power Co. v. United States*, 187 F.3d 1324 (11th Cir. 1999), the Eleventh Circuit applied *Loretto* to a statute requiring utility companies to provide cable companies with access to their telephone poles and related facilities. The court of appeals explained that under the applicable statute, "a utility has no choice but to permit a cable company or telecommunication carrier to permanently occupy physical space on its poles, ducts, conduits, and rights-of-way." *Id.* at 1328. "Such a permanent, physical occupation of property," the court concluded, "falls squarely within the *Loretto* rule." *Id.* at 1329. The court also noted that although the utilities' use of their poles, ducts, and conduits had always been highly regulated, the mandatory access provisions were new. *Id.* at 1326-27, 1330. The court explained that "the fact that property was taken for a public use to begin with does not mean that it may be taken again for another public use without the payment of just compensation to its owner." *Id.* at 1329.

Gulf Power does not "squarely conflict," Pet. 13, or even obliquely conflict, with the panel's decision in this case. Plaintiffs here challenge a fine that was imposed on them because they sold raisins on the open domestic market without complying with a regulatory scheme that has been in place for over sixty years. In contrast to *Nixon* and *Gulf Power*, the government did not "occupy" or even attempt to *take* plaintiffs' property, and the fines that the

government imposed were fully consistent with historical expectations.

Plaintiffs also assert a conflict with *Hall v. City of Santa Barbara*, 833 F.2d 1270 (9th Cir. 1987). *Hall*, however, was expressly abrogated by the Supreme Court in *Yee v. City of Escondido*, 503 U.S. 519 (1992). This Court held in *Hall* that an ordinance requiring owners of mobile home parks to give unending leases to tenants constituted a physical taking of their property. *Hall*, 833 F.2d at 1276. Plaintiffs cite *Hall* for the proposition that a taking may be "per se" even if the property owner can avoid it by "'going out of business,'" and then plaintiffs suggest that the decision was "abrogated on other grounds." Pet. 13-14 (quoting *Hall*, 833 F.2d at 1277-78). But that holding is exactly what the Supreme Court rejected in *Yee*. As the Supreme Court explained, the *Yees* "relied almost entirely on *Hall* . . . which had held that a similar mobile home rent control ordinance effected a physical taking." *Yee*, 503 U.S. at 525. The Court held, however, that, contrary to *Hall*, an ordinance of this sort did *not* constitute a physical taking, because it was conditioned on the choice to enter a particular market. The Court explained that "[t]he government effects a physical taking only where it *requires* the landowner to submit to the physical occupation of his land." *Id.* at 527-29.

3. Plaintiffs' request for rehearing should be denied not only because they fail to identify any way in which the panel's decision conflicts with Supreme Court or court of appeals precedent, but also because the legal rule that they advocate has already been rejected by the Supreme Court. Plaintiffs' position is

that because the raisin marketing order hinges their ability to sell raisins on their participation in the raisin reserve program, the order effectuates a "direct appropriation" of their property by the government. From their perspective, the regulatory regime is no different than the government "com[ing] onto the Hornes' farm uninvited and walk[ing] off with forty-seven percent of their crops." Op. 9469-70; Pet. 10. But the Supreme Court has made clear that this distinction is of enormous significance. In *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987), the plaintiffs challenged a decision by the California Coastal Commission to grant the plaintiffs permission to rebuild their house only if they transferred to the public an easement across their beachfront property. Although the easement would have resulted in a direct transfer of property, the Court did *not* treat it as a per se, physical taking under *Loretto*. Instead, the Court analyzed the easement as a type of regulatory taking, entitling the plaintiffs to compensation only because there was no "essential nexus" between the easement and the building permit. The Court noted that "[h]ad California simply required the Nollans to make an easement across their beachfront available to the public on a permanent basis in order to increase public access to the beach, rather than conditioning their permit to rebuild their house on their agreeing to do so, we have no doubt there would have been a taking." *Id.* at 831. However, because the Commission instead required the easement as part of a "land-use regulation," *id.* At 834, the Court engaged in a more searching inquiry of its purposes.

Likewise, in *Dolan v. City of Tigard*, 512 U.S. 374 (1994), the Court declined to apply the *Loretto* rule to

a city ordinance that conditioned approval of the plaintiff's building permit on a dedication of a portion of her property to a public greenway and bike path. *Id.* at 387. Similar to *Nollan*, the Court noted that "had the city simply required petitioner to dedicate a strip of land . . . for public use, rather than conditioning the grant of her permit to redevelop her property on such a dedication," the taking would have been unquestionable. *Id.* at 384. But, because the land transfer was instead a conditional regulatory requirement, whether or not it constituted a compensable taking turned on whether "the required dedication [was] related both in nature and extent to the impact of the proposed development." *Id.* at 391.

Nollan and *Dolan* make clear the analytical distinction between a direct appropriation of physical property and a regulation that conditions particular uses of private property on the transfer of some portion of that property to the government. While either type of action may constitute a taking entitling the property owner to compensation, only a direct appropriation of property triggers the per se, physical taking rule announced in *Loretto*.

3. Although they have identified no actually conflicting decision of the Supreme Court or any court of appeals, plaintiffs contend that the panel has authorized an unprecedented intrusion into the commercial activities of business owners, with "sweeping ramifications for the stability of property rights within this Circuit." Pet. 21. Plaintiffs' fears are considerably overstated, particularly given the longstanding consistency of the federal courts in

upholding agricultural supply controls under the AMAA against takings challenges.

Indeed, this Court rejected a virtually identical takings claim over seventy years ago in *Wallace v. Hudson-Duncan*, 98 F.2d 985 (9th Cir. 1938). The plaintiff in *Wallace* challenged the walnut marketing order's requirement that producers contribute a percentage of their walnuts to a control board or provide economic consideration in lieu of such walnuts as a condition for selling walnuts in interstate commerce. *Id.* at 987. This Court rejected the plaintiff's takings claim, holding that the marketing order did not effectuate a "direct appropriation" of the plaintiff's property, but instead was a regulatory condition. *Id.* at 989. Every federal court to consider the issue since then has also rejected the notion that the price and supply controls promulgated under the AMAA implicate the Fifth Amendment. *See, e.g., Cal-Almond, Inc. v. United States*, 30 Fed. Cl. 244, 247 (1994); *Carruth v. United States*, 627 F.2d 1068, 1081 (Ct. Cl. 1980). The panel's decision in this case is modest by comparison, holding only that plaintiffs failed to demonstrate a "per se" taking, while leaving open the possibility that the raisin marketing order effectuates a compensable regulatory taking. Far from revolutionary, this is exactly the same conclusion reached by the Court of Federal Claims five years ago in *Evans v. United States*, 74 Fed. Cl. 554 (2006).

4. A final point counseling against rehearing is plaintiffs' failure to put forth any evidence or explanation as to how the raisin reserve requirement has a negative financial impact on their business. Plaintiffs cannot substantiate their claim of an

unconstitutional taking without demonstrating that the raisin reserve program causes them financial loss. *See Brown v. Legal Foundation of Washington*, 538 U.S. 216, 235-36 (2003). As the panel noted, it likely would be quite difficult for plaintiffs to gather such evidence, "given that the reserve-pool restrictions on the market supply of raisins serve to *raise* prices for [plaintiffs'] free-tonnage raisins, ostensibly making their business *more* profitable than it would be in an unregulated free market." Op. 9475. Plaintiffs sought to enjoy the higher prices resulting from that regulatory regime without bearing any of the burdens that go along with the benefits of the raisin price support program. Plaintiffs may wish to circumvent the system, but they cannot demonstrate that the government engaged in a "per se, physical taking" when it fined them for doing so.

CONCLUSION

For the foregoing reasons, this Court should deny the petition for rehearing or rehearing en banc.

Respectfully submitted,

TONY WEST
Assistant Attorney General

BENJAMIN W. WAGNER
United States Attorney

MICHAEL S. RAAB
KELSI BROWN CORKRAN
(202) 514-3159

Attorneys, Appellate Staff
Civil Division, Room 7216
950 Pennsylvania Ave., NW
Washington, DC 20530

[CERTIFICATE OF COMPLIANCE AND
CERTIFICATE OF SERVICE OMITTED

No. 10-15270

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MARVIN D. HORNE AND LAURA R. HORNE, D.B.A. RAISIN VALLEY FARMS, A PARTNERSHIP, AND D.B.A. RAISIN VALLEY FARMS MARKETING ASSOCIATION, A.K.A. RAISIN VALLEY MARKETING, AN UNINCORPORATED ASSOCIATION; MARVIN D. HORNE; LAURA R. HORNE; DON DURBAHN, AND THE ESTATE OF RENA DURBAHN, D.B.A. LASSEN VINEYARDS, A PARTNERSHIP,

Plaintiffs-Appellants,

v.

UNITED STATES DEPARTMENT OF AGRICULTURE,

Defendant-Appellee.

On Appeal from the United States District Court for the Eastern District of California (O'Neill, J.) Civil Action No. 1:08-cv-01549-LJO-SMS

REPLY BRIEF IN SUPPORT OF PETITION FOR PANEL REHEARING OR REHEARING *EN BANC*

Brian C. Leighton
Attorney at Law
701 Pollasky Avenue
Clovis, CA 93612
(559) 297-6190

Michael W. McConnell
Aditya Bamzai
KIRKLAND & ELLIS LLP
655 Fifteenth Street, N.W.
Washington, DC 20005
(202) 879-5000
Counsel for Plaintiffs-Appellants

December 30, 2011

[TABLE OF CONTENTS AND TABLE OF AUTHORITIES OMITTED]

INTRODUCTION

The Government's Opposition brief ("Opp.") to Plaintiffs' Petition for Rehearing ("Pet.") makes little attempt to defend the panel's reasoning and instead puts forward an array of new arguments never before raised in this litigation. The Government now contends that this Court lacks jurisdiction to address Plaintiffs' takings claim; that the physical takings doctrine does not apply to personal property; and that the taking at stake in this case should be analyzed under the test for mitigation measures in the land-use context. None of these new arguments has merit.

Indeed, the Opposition confirms the importance of this case for property rights within this Circuit. The Government boldly asserts the constitutional power:

- To take goods without compensation from a producer as a condition for the producer's participation in the marketplace;

- To assert, as the purpose for its taking, that it has somehow boosted the price of the producer's remaining goods; and

- To use the goods for any purpose it sees fit, including school lunch programs, without paying the producer for them.

Plaintiffs respectfully submit that these consequences are precisely what the Fifth Amendment was intended to foreclose. Accordingly, for the reasons explained in the Petition and elaborated upon below, this case cries out for rehearing, either by the panel or the *en banc* Court.

ARGUMENT

I. The Government's Newly Minted Jurisdictional Argument Lacks Merit And Is Inconsistent With the Government's Prior Interpretation Of The AMAA.

For the first time in this litigation, the Government asserts that this Court lacks jurisdiction to adjudicate Plaintiffs' takings claim. Opp. 6-8. According to the Government's new position, the Tucker Act vests exclusive jurisdiction over the claim in the United States Court of Federal

Claims. This newly minted argument conflicts not only with cases interpreting the Agricultural Marketing Agreement Act of 1937 ("AMAA"), *see, e.g.*, *Lion Raisins, Inc. v. United States*, 416 F.3d 1356, 1372 (Fed. Cir. 2005), but also with the Government's prior position in other cases.

1. It is well-settled, as the Government recognizes, that Congress may "withdraw[] the Tucker Act grant of jurisdiction" by statute. *Eastern Enterprises v. Apfel*, 524 U.S. 498, 520 (1998). Such withdrawal occurs, for example, when Congress enacts a "specific and comprehensive scheme for administrative and judicial review." *Lion Raisins*, 416 F.3d at 1372.

The AMAA creates such a "specific and comprehensive scheme" for "handlers" of raisins. Any "handler" who violates a marketing order is subject to fines and penalties in a final order of the Department of Agriculture, which is "reviewable in the district courts of the United States in any district in which the handler subject to the order is an inhabitant." 7 U.S.C. § 608c(14)(A)-(B). A "handler" may also bring a pre-enforcement petition with the Secretary of Agriculture arguing that a marketing order "is not in accordance with law." *Id.* § 608c(15)(A). The "District Courts of the United States in any district in which such handler is an inhabitant, or has his principal place of business, are [ ] vested with jurisdiction in equity to review such ruling." *Id.* § 608c(15)(B). Taken together, these provisions make clear that handlers must bring challenges to marketing orders and enforcement decisions in U.S. district courts, not

in the Federal Court of Claims under the Tucker Act.

Case law supports this interpretation. In *Lion Raisins*, a raisin producer brought a Tucker Act claim alleging (in relevant part) that the Raisin Administrative Committee ("RAC") had taken its storage bins without just compensation. *Id.* at 1370. The Federal Circuit held that, because the plaintiff was a "handler" under the AMAA, the Federal Court of Claims lacked jurisdiction over this claim. The court noted that section 608c(15) "provides an administrative remedy to handlers wishing to challenge marketing orders under the AMAA" and "vests the district courts with jurisdiction to review the Secretary's decision." *Id.* The court held that "the takings claim may not be brought against the government because the statute provides for an administrative remedy and for judicial review in district court." *Id.* at 1358; *see also* Wright & Miller, *Federal Practice & Procedure* § 3657 & n.33.

Indeed, *the Government itself* urged the Federal Circuit to adopt this holding. As the court observed, "[d]uring oral argument, counsel for the United States acknowledged that [plaintiff] has an administrative remedy and may file a section 608(c)(15)(A) petition seeking redress for the RAC's alleged actions." 416 F.3d at 1371. The court specifically asked the Government's counsel whether she would represent, "speaking with the authority of the Secretary of Agriculture, that the Secretary reads this statute broadly enough to encompass claims of the sort involved in the bin case?" *Id.* at 1371 n.12 (quoting the oral argument transcript). Counsel for the Government

unequivocally responded "Yes." *Id.* The instant case demonstrates why the court was wise to demand assurance on this point, because otherwise the Government could play the game of claiming that district courts have jurisdiction when handlers attempt to use the Tucker Act to challenge a taking, and claiming the case falls under the Tucker Act when handlers sue in district court.

In *Wallace v. Hudson-Duncan & Co.*, 98 F.2d 985 (9th Cir. 1938), this Court addressed a takings clause challenge to a walnut marketing order in a posture comparable to this case. The plaintiff, a handler, sought a "declaratory decree" under section 608c(15) that the walnut marketing order resulted in a taking of its private property. *See id.* at 986-87 & n.1, 989-91. This Court addressed the claim on the merits. Although the Government incorrectly cites *Wallace* as a case in which "this Court rejected a virtually identical takings claim," Opp. 17, it fails to recognize that, in order to resolve the takings claim, this Court must have asserted jurisdiction over it.

In the face of these precedents, the Government's statement that "[n]othing in the AMAA precludes a Tucker Act claim for an alleged taking under a marketing order" is difficult to comprehend. Opp. 7. By providing district court jurisdiction for both pre-enforcement and post-enforcement orders, the AMAA displaces the Tucker Act. It is equally difficult to comprehend what the Government means when it asserts that it is improper for Plaintiffs to ask this Court to decide "the hypothetical question whether the raisin marketing order would amount to an unconstitutional taking

were it not compensable under the Tucker Act." Opp. 8. There is nothing hypothetical about the question. Plaintiffs challenge an attempt by the Government to seek the monetary equivalent of the raisins that the Raisin Marketing Order, on the Government's interpretation, required them to hand over. It makes no sense for the Government to ask this Court to uphold its order requiring Plaintiffs to pay the monetary equivalent, and then demand that they file a second suit under the Tucker Act to recover their money in the form of just compensation for the taking. This is not a suit seeking money damages, nor a suit to enjoin a taking; it is an administrative appeal from an agency order on the ground that it constitutes a taking. *See Apfel*, 524 U.S. at 521-22. In such a case, where a separate "claim for compensation would entail an utterly pointless set of activities," the Tucker Act does not apply. *Id.* at 520 (quotation marks omitted).

The Government cites several cases from the federal courts of appeals and a single case from the Court of Federal Claims. But the cases are inapposite. The court of appeals cases do not involve the specific review provisions available under 608c, but rather statutory schemes that — in contrast to the AMAA — lack any specialized review procedure. And the Court of Federal Claims case addresses a takings claim that could not be brought using the specialized procedures set forth in section 608c. In *Evans v. United States*, 74 Fed. Cl. 554 (2006), the plaintiffs were not handlers and therefore were not subject to the review procedures of section 608c. *See id.* at 555. The court made this very point: "As producers, plaintiffs are specifically excluded from

the Agricultural Marketing Act's scope, 7 U.S.C. § 608c(13)(B), and administrative remedies are limited to handlers, 7 U.S.C. § 608c(15)." *Id.* at 564. The Government is thus wide of the mark in its assertion that "the Court of Federal Claims already adjudicated exactly such a claim" — and in its accusation that Plaintiffs have brought their claim in the Ninth Circuit because they "prefer to avoid" the Court of Claims' jurisprudence. Opp. 8. The Government itself brought this enforcement action under section 608c(14) against Plaintiffs in the Department of Agriculture. Having done so, the Government is in no position to fault Plaintiffs for requesting review in this Court using the very appeal processes established in the AMAA.

2. In a variation on its jurisdictional argument, the Government contends that Plaintiffs may not bring post-enforcement takings challenges to marketing orders at all. The Government raises this issue as part of its jurisdictional argument, *see* Opp. 6 (arguing that Plaintiffs cannot challenge "the USDA's imposition of fines based on plaintiffs' failure to comply with the regulatory scheme"); *see id.* at 6-8, and as part of its merits argument, *see id.* at 10. In neither instance does the Government cite any case law supporting its position. And for good reason: the argument is groundless — whether characterized as jurisdictional or merits.

The facts of this case amply illustrate why the Government's position is meritless. Here, because Plaintiffs did not believe themselves to be handlers subject to the Raisin Marketing Order, they did not believe they were required to set aside the reserve-tonnage requirement to give the RAC. The

Government then initiated an enforcement action under section 608c(14) against Plaintiffs in the USDA. The USDA disagreed with Plaintiffs' interpretation of the term "handler," determined that they are subject to the Raisin Marketing Order, and ordered Plaintiffs to pay the alleged dollar equivalent of the disputed raisins for the relevant crop years. According to the Government's new position, Plaintiffs forever waived their Takings Clause challenge to the Raisin Marketing Order because they did not believe themselves to be subject to that Order in the first place. There is no basis in law or logic to limit post-enforcement Takings Clause challenges in this manner. If a government order would be an unconstitutional taking, the victim of the taking cannot be fined the value of his property for refusing to comply, without opportunity to challenge the constitutionality of the underlying order.

3. Even if, however, there were (as the Government now claims) "a serious jurisdictional problem" with Plaintiffs' takings claim, Opp. 3, it would be reason to grant Plaintiffs' rehearing petition, not deny it. The panel affirmed on the merits. A dismissal of Plaintiffs' takings claim for lack of jurisdiction would require a different disposition of the case — dismissal rather than affirmance on the merits, with the opportunity for plaintiffs to take their case to a court with jurisdiction. *See Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83 (1998). Up until its most recent filing with this Court, the Government repeatedly agreed that this Court and the District Court had jurisdiction over Plaintiffs' takings claim. It would be manifestly unjust for this Court to

allow the Government to preserve its victory on the merits by arguing that the panel was wrong to exercise jurisdiction.

II. The Government's Arguments That Plaintiffs Have Not Established A Takings Claim Lack Merit.

A. Plaintiffs Have Established A Physical Taking Under *Loretto*.

As explained in the Petition for Rehearing, the Supreme Court has squarely held that a person's right to participate in the market "may not be conditioned on his forfeiting the right to compensation for a physical occupation." *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 439 n.17 (1982). The Government studiously ignores this holding, instead making two arguments for *Loretto*'s inapplicability. First, the Government argues that the physical takings doctrine does not apply to personal property, but only to real property. Opp. 9-14. Second, the Government argues that later Supreme Court cases have *sub silentio* overruled this holding of *Loretto*. Opp. 14-16. Both are meritless.

1. The Government's Argument That *Loretto* Does Not Apply To Personal Property Is Meritless.

The Government fails to cite a single case supporting its lead argument — made for the first time in this litigation in its Opposition — that the *per se* doctrine of *Loretto* does not apply to personal property. Even Magna Charta provided that King could not "take grain or other chattels of any one without immediate payment." Magna Charta, ch.

28, *reprinted in* 1 Bernard Schwartz, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY (1971). The first treatise on the United States Constitution, published in 1803, observed that the Takings Clause was enacted in response to "the arbitrary and oppressive mode of obtaining supplies for the army, and other public uses, by impressment, as was too frequently practiced during the revolutionary war, without any compensation whatever." 1 Henry St. George Tucker, BLACKSTONE'S COMMENTARIES app. at 305-06 (1803). The government's expropriation of raisins to use in school lunches raises the same issue.

Moreover, the Supreme Court has, albeit in *dicta*, included personal property within the category of property subject to the *per se* taking rule. *See United States v. Sperry Corp.*, 493 U.S. 52, 62 n.9 (1989). And *Loretto* itself relied on scholarship applying the physical takings doctrine to personal property. *See* 458 U.S. at 427 n.5.

Lower court precedent is to the same effect. In *Nixon v. United States*, 978 F.2d 1269 (D.C. Cir. 1992), the Government argued that "the *per se* takings doctrine applies only to the physical occupation of *real* property," reasoning (as here) that "the holding of *Loretto* is a narrow one." *Id.* at 1284. Judge Edwards, writing for the court, declared unequivocally that "[t]he argument fails for want of authority or logic." *Id.* "[T]he actual holding of *Loretto* makes no mention of a distinction between real and personal property, nor was any rationale given in the opinion that might justify such a distinction." *Id.*; *see also id.* at 1285 ("One may be just as permanently and completely dispossessed of personal property as of real property. Any

distinction along these lines would be purely artificial.").

The Government scrambles unsuccessfully to distinguish *Nixon*. It asserts that "the court of appeals did not hold that *all* personal property falls under the *Loretto* rule," because the Government in that case "had actually taken 'complete possession' of [presidential] papers contrary to the expectation 'since the beginning of the Republic,' that a President's papers are his private property." Opp. 12 (quoting *Nixon*, 978 F.2d at 1271, 1276-84).

That is a sheer rewriting of the opinion. The reference in the opinion to longstanding "expectations" addressed who is the owner of presidential papers. One might think the Nation who paid his salary, rather than the individual, owns the papers, but the historical expectation to the contrary resolved that issue. Upon determining that President Nixon owned the papers, the D.C. Circuit applied the *per se* taking doctrine to personal property without any balancing or analysis of expectation interests. *See* 978 F.2d at 1284-85. Because no one — not even the Government — has questioned that a farmer owns his crops, the first stage in the *Nixon* analysis is not at issue here. What matters is the second stage: an unequivocal holding that the doctrine of *per se* takings applies to personal property, whether it be raisins or rune stones.

2. The Government's Argument That The Supreme Court Has *Sub Silentio* Overruled *Loretto* Is Meritless.

The Government next argues that the holding in *Loretto* on which we rely has subsequently "been rejected by the Supreme Court" in *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374 (1994), two land-use cases. But the Government points to no language in either *Nollan* or *Dolan* that could be interpreted as overruling *Loretto*, nor does it cite any authority extending *Nollan* and *Dolan* outside the land-use context.

In *Nollan* and *Dolan*, the Supreme Court considered "takings challenges to adjudicative land-use exactions — specifically, government demands that a landowner dedicate an easement allowing public access to her property as a condition of obtaining a development permit." *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 546 (2005). "In each case, the Court began with the premise that, had the government simply appropriated the easement in question, this would have been a *per se* physical taking." *Id.* The Court, however, noted that it has "long recognized that land-use regulation does not effect a taking if it 'substantially advance[s] legitimate state interests' and does not 'den[y] an owner economically viable use of his land'" — which, the Court explained, required that the regulation further the same government interest that would furnish a valid ground for denial of the permit. *See Nollan*, 483 U.S. at 834. To be permissible

without compensation, a condition on a land-use permit that would otherwise constitute a taking must be a mitigation measure both directly related and proportionate to the injury the public suffers from the grant of the permit. *Dolan*, 512 U.S. at 391. Thus, in *Nollan*, a lateral easement arguably would have mitigated the public's loss of access to the beach caused by the permitted construction, but a horizontal easement along the beach did not, and was therefore a taking that required compensation.

A wealth of precedents limits *Nollan* and *Dolan* to the land-use context. *See, e.g.*, *Lingle*, 544 U.S. at 547 ("We have not extended [the *Nollan/Dolan*] standard 'beyond the special context of [land-use] exactions.'") (quoting *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 702 (1999) (same)); *West Linn Corporate Park, LLC v. City of West Linn*, 428 Fed. Appx. 700, 702 (9th Cir. Apr. 18, 2011) ("The Supreme Court has not extended *Nollan* and *Dolan* beyond situations in which the government requires a dedication of private real property."); *Iowa Assurance Corp. v. City of Indianola*, 650 F.3d 1094, 1099 (8th Cir. 2011) ("*Nollan* only applies to land-use exactions."). The Government simply fails to acknowledge these cases.

Indeed, the Eleventh Circuit in *Gulf Power Co. v. United States*, 187 F.3d 1324 (11th Cir. 1999), and this Court in *Hall v. City of Santa Barbara*, 833 F.2d 1270 (9th Cir. 1987), *abrogated on other grounds*, *Yee v. City of Escondido*, 503 U.S. 519 (1992), applied *Loretto*'s *per se* rule to the Government's attempt to condition a property-owner's right to participate in the marketplace on a requirement that the owner physically transfer some portion of his property to

the government. Those decisions are directly applicable here, and controlling.

The Government claims that *Gulf Power* does not "even obliquely conflict" with the panel's interpretation of *Loretto*, Opp. 13, but asserts only two irrelevant grounds as a possible distinction. First, the Government claims that *Gulf Power* is distinguishable because "Plaintiffs here challenge a fine that was imposed on them" due to their alleged noncompliance with the Raisin Marketing Order's requirement that they turn over their property to the RAC. This is just a reiteration of the Government's argument that Plaintiffs may not bring a post-enforcement takings challenge. As explained above, this argument has no merit. *See supra* pp. 8-9. Second, the Government argues that the "fines that the government imposed were fully consistent with historical expectations." Opp. 13. But *Gulf Power* contains no discussion of a party's "investment-backed expectations," because no such analysis is relevant in the context of physical takings. *See Loretto*, 458 U.S. at 432; *Palazzolo v. Rhode Island*, 533 U.S. 606, 628 (2001). The Opposition abundantly confirms that *Gulf Power* conflicts with the panel's decision.

The Government also argues that, in *Yee*, the Supreme Court rejected this Court's holding in *Hall* that *Loretto* "gave short shrift" to "the notion that the physical occupation is not permanent" where a property owner can avoid a taking "by going out of business." 833 F.2d at 1277-78, *abrogated on other grounds*, *Yee*, 503 U.S. at 525-26. But the Government simply ignores our argument that "*Yee* did not involve a compelled transfer of ownership to

the government, but merely a rent control scheme, which is a classic economic regulation." Pet. 14-17. It also conveniently disregards the Supreme Court's reaffirmance in *Yee* of the very footnote in *Loretto* that the Government claims the Supreme Court has subsequently repudiated. *See* 503 U.S. at 531-32 (approving of *Loretto*'s footnote 17).

B. It Is Irrelevant That The Government's Stated Purpose Is To Raise Prices For Raisin Growers.

Finally, the Government appears to argue that uncompensated takings of property cannot fall within the Fifth Amendment if the regulation's "express purpose" is to increase the "amount of money plaintiffs and other raisin farmers receive for their products." Opp. 5, 18. The Supreme Court has rejected that argument. In *Phillips v. Washington Legal Foundation*, 524 U.S. 156 (1998), the Court noted:

> [In *Loretto*,] we held that a property right was taken even when infringement of that right arguably increased the market value of the property at issue. Our conclusion in this regard was premised on our longstanding recognition that property is more than economic value; it also consists of 'the group of rights which the so-called owner exercises in his dominion of the physical thing,' such 'as the right to possess, use and dispose of it.'

Id. at 170 (citations omitted).

Even assuming for sake of argument that a properly designed program removing a certain portion of the crop from the market might increase crop prices, this provides no justification for the Government taking title to the unmarketed portion of every farmer's raisin crop and using it for the federal school-lunch program and other governmental purposes. *Cf. Dolan*, 512 U.S. at 392-93 (although an open-space requirement would mitigate increased water run-off, this provided no justification for requiring the landowner to open his land to the public for recreation). Indeed, this aspect of the marketing order program is counterproductive to the ostensible price-raising purpose. Rather than taking the reserve-tonnage raisins off the market, the Government uses the raisins for economically beneficial purposes as it sees fit, thereby ensuring that the supposed "increase in prices through scarcity" does not occur. As in *Nollan*, the condition that the Government imposes on Plaintiffs "utterly fails to further the end advanced as the justification." 483 U.S. at 837.

In light of these uncontested facts, it is truly remarkable for the Government to assert that Plaintiffs have failed "to put forth any evidence or explanation as to how the raisin reserve requirement has a negative financial impact on their business." Opp. 18. What more is there to say? The Government sought to take $483,843.53 worth of raisins over the two year period in question. It is commonly accepted that having one's property taken and used by someone else, without compensation, has a "negative financial impact" on business. The Government's assertion

that Plaintiffs must make some further showing defies common sense.

C. The Panel Opinion's Reasoning Has Dramatic Consequences For Property Rights In This Circuit.

As explained in the Petition for Rehearing:

> [I]t is important to keep in mind precisely what the panel opinion authorizes here — the appropriation without just compensation of almost fifty percent of Petitioners' raisin harvest from 2002-2003 and approximately one-third of the harvest from 2003-2004. (Indeed, without any compensation whatsoever for the 30 percent appropriation in 2003-2004.) If the panel opinion here stands, then USDA may require farmers in innumerable agricultural sectors to hand over fifty percent of their annual crop to the government for access to commercial markets — affecting billions of dollars of commerce.

Pet. 20. In response to these observations, the Government claims that "Plaintiffs' fears" about the panel opinion's consequences for property rights "are considerably overstated." Opp. 17. But the Government fails to dispute that Plaintiffs accurately describe the logical consequences of the panel opinion. It appears that Plaintiffs' "fears" — as described above and in their Petition — are well-founded indeed.

Rather than disputing Plaintiffs' observations about the panel opinion's logical consequences, the Government argues that, notwithstanding these consequences, this Court may take comfort that

courts have "uph[eld] agricultural supply controls under the AMAA against takings challenges." Opp. 17. But the Government cites only a single published opinion (the Federal Court of Claims' 2006 opinion in *Evans*) upholding the Raisin Marketing Order in the face of a Takings Clause challenge, which makes the panel the first Article III or appellate court to have upheld the Order. As *Evans* explained, the Raisin Marketing Order "stands out from most of its counterparts" and is "stricter." 74 Fed. Cl. at 558, 562. There is, in short, no longstanding line of precedents upholding the Order.

More notably still, even in upholding the Raisin Marketing Order, both this Court and the Federal Court of Claims described the provisions of the Order as "draconian." *Evans*, 74 Fed. Cl. at 555; Op. at 9472. There is thus a general recognition — shared by all, save (it appears) the Government — that the property appropriation the Order imposes on independent raisin farmers, like Plaintiffs, is dramatic and unique. Plaintiffs respectfully submit that such "draconian" results should not be imposed without this Court's having addressed the weighty issues that Plaintiffs have raised in their Petition.

CONCLUSION

For these reasons, this Court should grant panel rehearing or rehearing *en banc*.

Respectfully submitted,

Brian C. Leighton
Attorney at Law
701 Pollasky Avenue

Clovis, CA 93612
(559) 297-6190

/s/ Michael W. McConnell
Michael W. McConnell
Aditya Bamzai
KIRKLAND & ELLIS LLP
655 Fifteenth Street, N.W.
Washington, DC 20005
(202) 879-5000
Counsel for Plaintiffs-Appellants

December 30, 2011

[CERTIFICATE OF COMPLIANCE AND CERTIFICATE OF SERVICE OMITTED]

No. 10-15270

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MARVIN D. HORNE AND LAURA R. HORNE, D.B.A. RAISIN VALLEY FARMS, A PARTNERSHIP, AND D.B.A. RAISIN VALLEY FARMS MARKETING ASSOCIATION, A.K.A. RAISIN VALLEY MARKETING, AN UNINCORPORATED ASSOCIATION; MARVIN D. HORNE; LAURA R. HORNE; DON DURBAHN, AND THE ESTATE OF RENA DURBAHN, D.B.A. LASSEN VINEYARDS, A PARTNERSHIP,

Plaintiffs-Appellants,

v.

UNITED STATES DEPARTMENT OF AGRICULTURE,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA
No. 1:08-CV-01549-LJO-SMS

SURREPLY IN OPPOSITION TO PETITION FOR REHEARING AND REHEARING EN BANC

TONY WEST
Assistant Attorney General

BENJAMIN B. WAGNER
United States Attorney

MICHAEL S. RAAB
KELSI BROWN CORKRAN
(202) 514-3159
Attorneys, Appellate Staff
Civil Division, Room 7216
950 Pennsylvania Ave., NW
Washington, DC 20530

[TABLE OF CONTENTS AND TABLE OF AUTHORITIES OMITTED]

INTRODUCTION

Plaintiffs do not contest that the Tucker Act, 28 U.S.C. § 1491(a), vests exclusive jurisdiction over takings claims in the United States Court of Federal Claims. Instead, they argue that the Agricultural Marketing Agreement Act, 7 U.S.C. § 608c(15) ("AMAA"), withdraws Tucker Act jurisdiction over their particular takings claim, thus allowing them to assert that challenge in this suit. But the AMAA's administrative and judicial review provisions apply only to handlers. The raisins set aside for reserve under the regulatory scheme belong to producers, and therefore any takings claim that plaintiffs assert is in their capacity as producers, not handlers. When

a producer-handler asserts an injury in its capacity as a producer, the AMAA's administrative and judicial review provisions do not apply.

Lion Raisins, Inc. v. United States, 416 F.3d 1356 (Fed. Cir. 2005) involved wholly distinguishable claims. Lion, a producer-handler, asserted takings claims arising out of the alleged failure of the Raisin Administrative Committee ("RAC") to fulfill its statutory obligation to distribute reserve pool proceeds among producers, as well as its regulatory obligation to compensate handlers for expenses incurred in storing reserve raisins. The Federal Circuit found neither claim cognizable under the Tucker Act because takings claims cannot be premised on regulatory or statutory violations, and because Lion had not actually asked the agency for compensation for its storage expenses. *See id.* At 1369-72. It is with respect to the storage expenses only that the Federal Circuit held, and the government agreed, that the AMAA required Lion to seek equitable restitution from the agency under section 608c(15) of the Act rather than *seeking* compensation directly in the Court of Federal Claims. Neither the Federal Circuit nor the government suggested that the AMAA withdraws Tucker Act jurisdiction where, as here, the plaintiff asserts a Fifth Amendment takings claim rather than a claim that the RAC failed to comply with its statutory or regulatory obligations.

Plaintiffs' merits argument fares no better. Plaintiffs cannot demonstrate that the regulatory regime effectuates a per se, physical taking, as evidenced by plaintiffs' inability to point to any actual appropriation of their property by the

government. Plaintiffs' suit challenges fines imposed on plaintiffs because they voluntarily chose to sell raisins on the open domestic market without complying with a regulatory regime that was put in place to stabilize the prices that plaintiffs and other raisin producers receive for their crop. While plaintiffs are free to challenge that regime as effectuating a compensable regulatory taking, they fall far short of establishing that they suffered the sort of physical taking that automatically entitles a property owner to compensation.

ARGUMENT

1. Plaintiffs do not dispute that the Tucker Act vests the United States Courts of Federal Claims with exclusive jurisdiction over takings claims. Instead, plaintiffs argue that they may assert their takings challenge in this suit because the AMAA withdraws Tucker Act jurisdiction over takings claims by handlers. *See* Rh'g Reply ("Reply") 2-3. But any takings claim asserted by plaintiffs arises in their capacity as producers, not handlers. As plaintiffs repeatedly acknowledge, although handlers are tasked with responsibility for sorting the raisins, it is producers who own the raisins set aside for reserve and who receive no direct payment when title to a portion of their crop is transferred to the RAC. *See, e.g.*, Rh'g Pet. 5-6 (describing the raisin reserve program as "effect[ing] a direct transfer of title of a *producer's* 'reserve tonnage' raisins to the government) (emphasis added); *id.* at 11 (asserting that "[t]he government demands that raisin *producers* give a government committee ownership over a hefty proportion of the producers' crop")

(emphasis added). Plaintiffs have not argued that the regulatory regime results in a government taking of any property belonging to handlers.

To be sure, the enforcement order that plaintiffs challenge in this suit was imposed on them in their capacity as handlers, and thus required administrative exhaustion under the AMAA. Plaintiffs do not contend, however, that that order effectuates a taking, nor could they; the order simply imposes penalties on plaintiffs for failing to comply with the regulatory scheme. Instead, plaintiffs argue that the raisin reserve program effectuates an unconstitutional taking of property from producers, thus justifying their refusal to comply with the regulatory obligations imposed on handlers. But as the Supreme Court and this Court have repeatedly held, a takings challenge against the federal government is "premature until the property owner has availed itself of the process provided by the Tucker Act." *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 195 (1985); *see also, e.g., Consejo de Desarrollo Economico de Mexicali, A.C. v. United States*, 482 F.3d 1157, 1172 (9th Cir. 2007); *Bay View, Inc. v. Ahtna, Inc.*, 105 F.3d 1281, 1285 (9th Cir. 1997).

Nothing in the AMAA precludes plaintiffs from alleging in the Court of Federal Claims that the raisin reserve program injures them in their capacity as producers by subjecting them to a taking of their crop without compensation. In determining whether a particular claim brought by a producer-handler is subject to the AMAA's administrative and judicial review scheme, "the crucial question is whether a producer-handler is bringing suit in its capacity as a

producer or as a handler." *Edaleen Dairy, LLC v. Johanns*, 467 F.3d 778, 783 (D.C. Cir. 2006). Courts have consistently recognized that when a producer-handler asserts an injury in its capacity as a producer, the AMAA's administrative exhaustion and judicial review requirements do not apply. *See Arkansas Dairy Co-op Ass'n, Inc. v. U.S. Dept. of Agriculture*, 573 F.3d 815, 823 n.4 (D.C. Cir. 2009) ("Where a single entity acts as a vertically-integrated 'producer-handler,' it must exhaust before bringing suit in its capacity as a handler, but not when bringing suit in its capacity as a producer"); *see also Alto Dairy v. Veneman*, 336 F.3d 560, 569 (7th Cir. 2003); *Dairylea Co-op., Inc. v. Butz*, 504 F.2d 80, 82-83 (2d Cir. 1974).[1]

With respect to their takings claim, then, plaintiffs are situated exactly like the plaintiff raisin producer whose takings claim was adjudicated by the Court of Federal Claims in *Evans v. United States*, 74 Fed. Cl. 554 (2006). And where, as here, a takings claim *may*

---

[1] This Court has recognized that by including in the AMAA a comprehensive administrative and judicial review scheme for handlers but not producers, Congress divested courts of authority to entertain producer challenges to marketing orders where their interests are already represented by handlers. *See, e.g., United Dairymen of Arizona v. Veneman*, 279 F.3d 1160, 1164-67 (9th Cir. 2002). But no handler would have standing to assert a takings claim based on the raisin reserve requirement because the transfer of property occurs exclusively between the RAC and producers. And any producer-handler asserting such a claim would be doing so in its capacity as a producer. *See* supra p. 3. Plaintiffs' takings challenge thus falls outside the category of producer claims for which the AMAA precludes judicial review. *See Stark v. Wickard*, 321 U.S. 288, 309-10 (1944) (allowing a producer to challenge an alleged infringement of a "definite personal right[ ]" under a milk marketing order).

be brought in the Court of Federal Claims, the Tucker Act *requires* that the claim be brought in that court. *See Eastern Enterprises v. Apfel*, 524 U.S. 498, 520 (1998) (plurality opinion) (a takings claim "must be brought to the Court of Federal Claims in the first instance, unless Congress has withdrawn the Tucker Act grant of jurisdiction in the relevant statute").[2]

2. Plaintiffs misapprehend both the Federal Circuit's holding and the government's position in *Lion Raisins, Inc. v. United States*, 416 F.3d 1356 (Fed. Cir. 2005). Lion, a raisin producer-handler, asserted two takings claims under the Tucker Act. First, in its capacity as a producer, Lion alleged that it was entitled to compensation because the RAC had, in violation of its statutory and regulatory obligations, used reserve pool proceeds to finance future export programs rather than distributing them among the producers who had an equitable interest in those proceeds. *Id.* at 1361. Second, in its capacity as a handler, Lion alleged that it was entitled to compensation because the RAC, in violation of its regulatory and contractual obligations, failed to reimburse Lion for several thousand raisin bins that belonged to Lion and were not returned after they were used to ship reserve

---

[2] *Wallace v. Hudson-Duncan Co.*, 98 F.2d 985 (9th Cir. 1938), does not suggest otherwise. The plaintiff in that case was a walnut handler who brought a takings claim based on a marketing order that allegedly effectuated a taking of the plaintiff's property in its capacity as a handler. *See id.* at 987. This Court's adjudication of that claim in no way indicates that the AMAA withdraws Tucker Act jurisdiction over takings claims brought by producer-handlers in their capacity as producers.

raisins pursuant to the RAC's instructions. *Id.*; *se also Evans*, 74 Fed. Cl. at 558-59 (explaining tha Lion asserted its reserve pool claim in its capacity a a producer and its bins claim in its capacity as handler).

The Federal Circuit held that neither claim wa cognizable under the Tucker Act because the law i "clear that a claim premised on a regulatory [o statutory] violation does not state a claim for taking." *Id.* at 1369-70. Moreover, the court c appeals explained, with respect to the bin claim, th agency's regulations specifically obligated the RAC t compensate handlers for expenses incurred i storing and handling reserve raisins. Accordingly Lion was free to seek equitable restitution via th administrative review process provided in th AMAA. *Id.* at 1371-72.

It is in this context *only* that the Federal Circui held, and the government agreed, that "the taking claim may not be brought against the governmen because the statute provides for an administrativ remedy." Reply 4 (quoting *Lion*, 416 F.3d at 1358 *see also Lion*, 416 F.3d at 1371 n.12 (quotin government counsel as agreeing that Lion could file section 608c(15)(A) petition with respect to "claims c the sort *involved in the bin case*") (emphasis added The Federal Circuit did not hold, as plaintiff suggest, that the Court of Federal Claims lacke jurisdiction over Lion's claims simply "because [Lion was a 'handler' under the AMAA." Reply 3-4.

Plaintiffs' takings claim is wholly distinct fron those in *Lion*. Plaintiffs do not allege that the raisi reserve requirement is contrary to any statutory o regulation provision, nor do they argue that an

statutory or regulatory provision entitles them to compensation for any raisins they reserve. Their takings claim rests solely on the view that the raisin reserve requirement entitles producers to compensation under the Fifth Amendment. That is precisely the sort of claim that Congress intended the Tucker Act to govern. Indeed, *Lion* expressly contemplates Tucker Act jurisdiction over takings claims against the RAC premised on the Fifth Amendment rather than the RAC's alleged failure to comply with its statutory, regulatory, or contractual obligations. Although the government had argued that the United States could not be held liable for an alleged taking by a non-appropriated funds instrumentality ("NAFI") such as the RAC, the Federal Circuit rejected that argument, holding that "[t]he RAC is an agent of the United States, and the United States may properly be sued in the Court of Federal Claims for any takings that are allegedly consummated by the acts of its agent." *Lion*, 416 F.3d at 1368; *see also id.* at 1358 ("[T]he Court of Federal Claims has jurisdiction over takings claims against the United States based on the actions of the RAC."). And nothing in the decision supports plaintiffs' assertion that their status as handlers is sufficient in itself to preclude Tucker Act jurisdiction; if that were true, the Federal Circuit would have dismissed Lion's claims on that basis alone rather than considering in detail whether administrative remedies were available for the takings Lion alleged.

3. Plaintiffs' final jurisdictional argument is that they must be allowed to assert their takings challenge now before this Court because they were not previously aware that the raisin reserve program

applied to them, and therefore this suit presents the only opportunity they had to present the claim. Reply 8-9. It is unclear why plaintiffs believe that their purported misunderstanding about their regulatory obligations would have any bearing on this Court's jurisdiction, nor do they provide any support for their contention that "post-enforcement Takings Clause challenges" fall under a never before identified exception to the Tucker Act's exclusive jurisdiction over takings claims. Reply Br. 9.

In any event, the record below establishes that beginning a year before the time period for which the USDA imposed fines on plaintiffs, the agency repeatedly notified plaintiffs that their business model rendered them handlers under the raisin marketing order. *See* Appellee's Br. 6-13. If plaintiffs had chosen at that point to comply with the regulatory regime, they could have avoided paying fines while also seeking compensation in the Court of Federal Claims for the portion of their crop placed in reserve. To be sure, for the reasons already explained by this Court, *see* Op. 9467-75, and in *Evans*, 74 Fed. Cl. at 554, plaintiffs' claim lacks merit and would be properly denied in the Court of Federal Claims just as it was denied here. The government's point is simply that the Tucker Act vests the Court of Federal Claims with exclusive jurisdiction to adjudicate the claim.

4. Plaintiffs' Reply repeats their argument that the RAC subjected them to a per se, physical taking without compensation, but does not overcome the critical problem with their claim: the RAC never actually took or even attempted to take possession of plaintiffs' raisins. The absence of any appropriation

of physical property in this case is not a technicality arising from the procedural posture of plaintiffs' claim. Plaintiffs cannot point to an actual transfer of their raisins to the government because the regulatory regime they challenge does not effectuate a physical taking. As this Court explained, "[f]ar from compelling a physical taking of the Hornes' tangible property, the Raisin Marketing Order applies to the Hornes only insofar as they voluntarily choose to send their raisins into the stream of interstate commerce. Simply put, it is a use restriction, not a direct appropriation." Op. 9470. And even after plaintiffs chose to sell raisins on the open domestic market, the government did not "come onto the Hornes' farm uninvited and walk off with . . . their crops." *Id.* at 9469-70. Plaintiffs brought this suit to appeal fines they incurred for failing to comply with a regulatory regime specifically designed to stabilize prices for the commodity that plaintiffs voluntarily chose to sell. Plaintiffs' takings challenge to those fines falls squarely within the category of claims that must be adjudicated under the *Penn Central* factors for determining whether a regulatory requirement constitutes a compensable taking. *See Penn. Cent. Transp. Co. v. N.Y.C.*, 438 U.S. 104, 124 (1978) (considering the economic impact of the regulation on the claimant, the extent to which the regulation interferes with reasonable investment-backed expectations, and the character of the governmental action).

This Court did not hold, nor has the government argued, that plaintiffs are precluded from bringing any takings challenge to the regulatory regime. The Court simply held that plaintiffs failed to demonstrate that they suffered a physical taking of

their crop within the meaning of *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). *See* Op. 9475. If plaintiffs wish to challenge the raisin reserve program as effectuating a compensable regulatory taking, they are free to do so in the Court of Federal Claims.

CONCLUSION

For the foregoing reasons, this Court should deny the petition for rehearing or rehearing en banc.

Respectfully submitted,

TONY WEST
Assistant Attorney General

BENJAMIN B. WAGNER
United States Attorney

MICHAEL S. RAAB
KELSI BROWN CORKRAN
(202) 514-3159
Attorneys, Appellate Staff
Civil Division, Room 7216
950 Pennsylvania Ave., NW
Washington, DC 20530

[CERTIFICATE OF COMPLIANCE AND CERTIFICATE OF SERVICE OMITTED]

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MARVIN D. HORNE and LAURA R. HORNE, d.b.a. RAISIN VALLEY FARMS, a partnership, and d.b.a. RAISIN VALLEY FARMS MARKETING ASSOCIATION, a.k.a. RAISIN VALLEY MARKETING, an unincorporated association; MARVIN D. HORNE; LAURA R. HORNE; DON DURBAHN, and the ESTATE OF RENA DURBAHN, d.b.a. LASSEN VINEYARDS, a partnership,

Plaintiffs - Appellants,

v.

UNITED STATES DEPARTMENT OF AGRICULTURE,

Defendant - Appellee.

No. 10-15270

D.C. No. 1:08-cv-01549-LJO-SMS
Eastern District of California, Fresno

ORDER

Before: REINHARDT, HAWKINS, and GOULD, Circuit Judges.

Plaintiffs-Appellants' Motion for Leave to File Supplemental Brief in Support of Petition for Panel Rehearing or Rehearing *En Banc* is DENIED.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MARVIN D. HORNE and LAURA R. HORNE, d.b.a. RAISIN VALLEY FARMS, a partnership, and d.b.a. RAISIN VALLEY FARMS MARKETING ASSOCIATION, a.k.a. RAISIN VALLEY MARKETING, an unincorporated association; MARVIN D. HORNE; LAURA R. HORNE; DON DURBAHN, and the ESTATE OF RENA DURBAHN, d.b.a. LASSEN VINEYARDS, a partnership,

Plaintiffs-Appellants,

v.

UNITED STATES DEPARTMENT OF AGRICULTURE,

Defendant-Appellee.

No. 10-15270

D.C. No. 1:08-cv-01549-LJO-SMS
Eastern District of California, Fresno

ORDER

Before: REINHARDT, HAWKINS, and GOULD, Circuit Judges.

The opinion filed July 25, 2011, slip op. 9453, and appearing at ___ F.3d ___, No. 10-15270, 2011 WL 2988902 (9th Cir. 2011), is hereby amended per the Amended Opinion filed concurrently with this Order.

The panel has voted to deny the petition for panel rehearing. Judges Reinhardt and Gould have voted to deny the petition for panel rehearing en banc, and Judge Hawkins has so recommended.

The full court was advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing and the petition for rehearing en banc are **DENIED**.

No further petitions for rehearing or rehearing en banc will be accepted for filing.

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MARVIN D. HORNE and LAURA R. HORNE, d.b.a. RAISIN VALLEY FARMS, a partnership, and d.b.a. RAISIN VALLEY FARMS MARKETING ASSOCIATION, a.k.a. RAISIN VALLEY MARKETING, an unincorporated association; MARVIN D. HORNE; LAURA R. HORNE; DON DURBAHN, and the ESTATE OF RENA DURBAHN, d.b.a. LASSEN VINEYARDS, a partnership,

Plaintiffs-Appellants,

v.

UNITED STATES DEPARTMENT OF AGRICULTURE,

Defendant-Appellee.

No. 10-15270
D.C. No. 1:08-cv-01549-LJO-SMS

AMENDED OPINION

Appeal from the United States District Court
for the Eastern District of California
Lawrence J. O'Neill, District Judge, Presiding

Argued and Submitted
April 14, 2011—Pasadena, California

Filed July 25, 2011
Amended March 12, 2012

Before: Stephen Reinhardt, Michael Daly Hawkins, and
Ronald M. Gould, Circuit Judges.

Opinion by Judge Hawkins

2779

COUNSEL

Brian C. Leighton, Clovis, California, for the plaintiffs-appellants.

Benjamin B. Wagner, United States Attorney, and Benjamin E. Hall, Assistant United States Attorney, Fresno, California, for the defendant-appellee.

OPINION

HAWKINS, Senior Circuit Judge:

This appeal of a United States Department of Agriculture ("USDA") administrative decision asks us to interpret and pass on the constitutionality of a food product reserve program authorized by the Agricultural Marketing Agreement Act of 1937, as amended, 7 U.S.C. § 601 *et seq.* ("AMAA"), and implemented by the Marketing Order Regulating the Handling of Raisins Produced from Grapes Grown in California, 7 C.F.R. Part 989 ("Raisin Marketing Order" or "the Order"), first adopted in 1949.

Farmers Marvin and Laura Horne ("the Hornes"[3]) protest the USDA Judicial Officer's ("JO") imposition of civil penalties and assessments for their failure to comply with the reserve requirements, among other regulatory infractions, contending: (1) they are producers not subject to the Raisin Marketing Order's provisions; (2) even if subject to those provisions, the requirement that they contribute a specified percentage of their annual raisin crop to the government-controlled reserve pool constitutes an uncompensated *per se* taking in violation of the Fifth Amendment; and (3) the penalties imposed for their "self-help" noncompliance with the Raisin Marketing Order violate the Eighth Amendment Excessive Fines Clause. We affirm.

BACKGROUND

I. Regulatory Framework

Raisins and other agricultural commodities are heavily regulated under federal marketing orders adopted pursuant to the AMAA, a Depression-era statute enacted in response to plummeting commodity prices, market disequilibrium, and the accompanying threat to the nation's credit system. 7 U.S.C. § 601 *et seq.*; *see Zuber v. Allen*, 396 U.S. 168,

---

[3] Collectively referred to as "the Hornes," the Plaintiffs-Appellants are Marvin and Laura Horne, d/b/a Raisin Valley Farms (a California general partnership), and d/b/a Raisin Valley Farms Marketing Association (a California unincorporated association), together with their business partners Don Durbahn and the Estate of Rena Durbahn, collectively d/b/a Lassen Vineyards (a California general partnership).

174-76 (1969); *see generally* Daniel Bensing, "The Promulgation and Implementation of Federal Marketing Orders Regulating Fruit and Vegetable Crops Under the Agricultural Marketing Agreement Act of 1937," 5 *San Joaquin Agric. L. Rev.* 3 (1995). The declared purposes of the AMAA are, *inter alia*, to help farmers achieve and maintain price parity for their agricultural goods and to protect producers and consumers alike from "unreasonable fluctuations in supplies and prices" by establishing orderly marketing conditions. 7 U.S.C. § 602; *see Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 138 (1963); *Pescosolido v. Block*, 765 F.2d 827, 830 (9th Cir. 1985).

To achieve these goals, the AMAA delegates authority to the Secretary of Agriculture ("Secretary") to issue marketing orders[4] regulating the sale and delivery of agricultural goods, 7 U.S.C. § 608c, principally by imposing production quotas or by restricting the supply of a commodity for sale on

---

[4] According to the specific promulgation procedures mandated by the AMAA, the Secretary may only issue a marketing order if, after providing notice and opportunity for hearing, he finds that "the issuance of such order . . . will tend to effectuate the declared policy" of the Act. 7 U.S.C. § 608c(3)-(4). Such order will not become effective until approved by both (1) the handlers of at least 50 percent of the volume of the commodity covered by the proposed order and (2) either (a) two-thirds of producers of that commodity during a representative period or (b) producers of two thirds of the volume of that commodity during said period. *Id.* § 608c(8); *see id.* § 608b. The Secretary may terminate or suspend any marketing order upon finding it "obstructs or does not tend to effectuate the declared policy" of the Act, or upon request of a majority of active producers during a representative time period. *Id.* § 608c(16).

the open market, either through marketing allotments or reserve pools, *see id.* § 608c(6).[5] The Secretary, in turn, is authorized to delegate to industry committees the power to administer marketing orders. 7 U.S.C. § 608c(7)(C); *see* 7 C.F.R. § 989.35 (2006). Marketing orders under the AMAA apply only to "handlers," i.e., those who process and pack agricultural goods for distribution,[6] and do not

---

[5] Section 8c of the AMAA, 7 U.S.C. § 608c, the key statutory provision dealing with the marketing orders, originated in a 1935 amendment to the Agricultural Adjustment Act of 1933, Pub. L. No. 73-10, 48 Stat. 31 ("AAA"). The Supreme Court invalidated parts of the AAA in 1936, *see United States v. Butler*, 297 U.S. 1, 77 (1936), but Congress quickly reenacted most of the AAA's production-control measures in the AMAA, which the Supreme Court subsequently upheld against various constitutional challenges, *see United States v. Rock Royal Co-op, Inc.*, 307 U.S. 533 (1939).

[6] A "handler" under the Raisin Marketing Order is

> (a) [a]ny processor or packer; (b) any person who places, ships, or continues natural raisins in the current of commerce from within [California] to any point outside thereof; (c) any person who delivers off-grade raisins, other failing raisins or raisin residual material to other than a packer or other than into any eligible non-normal outlet; or (d) any person who blends raisins [subject to certain exceptions].

7 C.F.R. § 989.15. A "packer," in turn, is "any person who, within [California], stems, sorts, cleans, or seeds raisins, grades stemmed raisins, or packages raisins for market as raisins," but does not include a producer who sorts and cleans his own raisins in their unstemmed form. *Id.* § 989.14.

apply to any producer "in his capacity as a producer."[7] 7 U.S.C. §§ 608c(1), 608c(13)(B).[8]

Any handler who fails to comply with the terms of a marketing order is subject to civil forfeiture, as well as possible civil and criminal penalties. 7 U.S.C. §§ 608a(5), 608a(6), 608c(14) (authorizing civil penalties up to $1,000 for each violation, with each day constituting a separate violation).

The Raisin Marketing Order was originally enacted in 1949, *see* 14 Fed. Reg. 5136 (Aug. 18, 1949) (codified, as amended, at 7 C.F.R. Part 989), in an effort to stabilize raisin prices by controlling production surpluses, which since 1920 had consistently been thirty to fifty percent of each year's

---

[7] A "producer" under the Raisin Marketing Order is "any person engaged in a proprietary capacity in the production of grapes which are sun-dried or dehydrated by artificial means until they become raisins." 7 C.F.R. § 989.11.

[8] The regulation of handlers, as opposed to growers, appears to be a vestige of the historical context in which the AMAA was enacted, "an era when small, independent growers were frequently left to the mercy of large handlers who could benefit from their market power and position." Bensing, *supra*, at 8. In the raisin industry, producers generally own the land on which the grapevines are located, and they typically pick the grapes and dry them on trays before selling the unstemmed raisins to packers, or "handlers." Packers then prepare the raisins for commercial sale and distribution by cleaning, stemming, seeding, grading, sorting, and packaging the raisins into containers. Packers then typically sell the packed raisins to wholesalers, distributors, and other dealers for resale and distribution to the public. *Brown v. Parker*, 39 F. Supp. 895, 896-97 (S.D. Cal. 1941), *rev'd on other grounds by Parker v. Brown*, 317 U.S. 341 (1943).

crop. *See Parker*, 317 U.S. at 363-64.[9] Like many other fruit and vegetable orders issued under the AMAA,[10] the Order provides for the establishment of annual reserve pools, as determined by each year's crop yield, thereby removing surplus raisins from sale on the open domestic market and indirectly controlling prices. *See* 7 U.S.C. § 608c(6)(E); 7 C.F.R. §§ 989.54(d), 989.65. By February 15 of each year, the Raisin Administrative Committee ("RAC")—an industry committee charged with administration of the Raisin Marketing Order,[11] *see* 7 C.F.R. §§ 989.35,

---

[9] The raisin industry has long been an important one in California, where 99.5 percent of the U.S. crop and 40 percent of the world's crop are produced. *See* The California Raisin Industry, http://www.calraisins.org/about/the-raisin-industry/ (last visited July 6, 2011). Raisin prices rose rapidly between 1914 and 1920, peaking in 1921 at $235 per ton. This price increase spurred increased production, which in turn caused prices to plummet back down to between $40 and $60 per ton, even while production continued to expand. As a result of this growing disparity between increasing production and decreasing prices, the industry became "compelled to sell at less than parity prices and in some years at prices regarded by students of the industry as less than the cost of production," finally prompting federal government intervention with the Raisin Marketing Order in 1949. *See Parker*, 317 U.S. at 363-64 & nn.9-10.

[10] For a comparison of the Raisin Marketing Order and marketing orders for other agricultural products, such as walnuts, almonds, prunes, tart cherries, and spearmint, see *Evans v. United States*, 74 Fed. Cl. 554, 558 (2006), *aff'd*, 250 Fed. Appx. 321 (Fed. Cir. 2007).

[11] The RAC is currently comprised of forty-seven industry-nominated representatives appointed by the Secretary, of whom thirty-five represent producers, ten represent handlers, one represents the cooperative bargaining association, and one

989.36—recommends the "reserve tonnage" and "free-tonnage" percentages for that year, which the Secretary then promulgates. *See id.* §§ 989.54(d), 989.55. The reserve-tonnage requirement varies from year to year; for example, in the 2002-03 and 2003-04 crop years at issue here, the reserve percentages were set at forty-seven percent and thirty percent of a producer's crop, respectively.

As a result of the Order's reserve program requirements, a producer receives payment (at a pre-negotiated field market price) upon delivery of raisins to a handler only for the free-tonnage raisins, which the handler is then free to sell on the domestic market without restrictions. *See id.* § 989.65. The reserve-tonnage raisins, on the other hand, must be held by the handler in segregated bins "for the account" of the RAC until the RAC sells them to handlers for resale in export markets or directs that they be sold or disposed of in secondary, non-competitive markets, such as school lunch programs, either by direct sale or gift to U.S. agencies or foreign governments. *Id.* §§ 989.54, 989.56, 989.65, 989.67, 989.166, 989.167. The reserve pool sales are used to finance the RAC's administration, and any remaining net proceeds must then be equitably distributed to the producers on a pro rata basis. *See* 7 U.S.C. § 608c(6)(E) (providing for "the equitable distribution of the net return derived from the sale

---

represents the public. *See* 7 C.F.R. §§ 989.26, 989.29, 989.30. The RAC is an agent of the federal government but receives no federal appropriations. Instead, it is funded by assessments levied on handlers per ton of raisins sold on the open market and by proceeds from the sale of reserve-tonnage raisins. *See* 7 C.F.R. §§ 989.53, 989.79, 989.80(a), 989.82.

[of reserve-pool raisins] among the persons beneficially interested therein"); 7 C.F.R. § 989.66(h). Thus, although producers do not receive payment for reserve-tonnage raisins at the time of delivery to a handler, they retain a limited equity interest in the net proceeds of the RAC's disposition of the reserve, to be paid at a later time.

The RAC is tasked with selling the reserve raisins in a manner "intended to maxim[ize] producer returns and achieve maximum disposition of such raisins by the time reserve tonnage raisins from the subsequent crop year are available," 7 C.F.R. § 989.67(d)(1), but the Hornes complain that they have not received any reserve sale proceeds since the mid-1990s. For example the RAC designated forty-seven percent of the 2002-03 crop as reserve tonnage, which it then sold for $970 per ton, but none of the money the RAC received was paid back to the raisin producers.

In addition to the reserve pool requirement, the Raisin Marketing Order obliges handlers to, *inter alia*: file reports with the RAC, pay assessments to the RAC, and grant the RAC access to records for auditing purposes. *See id.* §§ 989.58, 989.59, 989.73, 989.77, 989.80.

II. The Hornes' Raisin Enterprises

Marvin and Laura Horne have been producing raisins in Fresno and Madera Counties in California since 1969 and in 1999 registered as a California general partnership under the name Raisin Valley Farms. They also own and operate Lassen Vineyards, another registered California general partnership, in partnership with Laura's parents,

Don and Rena Durbahn. Disillusioned with a regulatory scheme they deemed "outdated" and exploitive of farmers, the Hornes looked for ways to avoid the Raisin Marketing Order's requirements, particularly its mandatory raisin reserve program. Because those requirements apply only to handlers, the Hornes implemented a plan to bring their raisins to market without going through a traditional middle-man packer. As part of their plan, the Hornes purchased their own equipment and facilities to clean, stem, sort, and package raisins, which they installed on Lassen Vineyards property in 2001. Not only did this facility handle the raisins from Raisin Valley Farms and Lassen Vineyards, it also contracted with more than sixty other raisin growers to clean, stem, sort, and in some cases box and stack their raisins for a per-pound fee, typically twelve cents per pound.[12] USDA records reflect that Lassen Vineyards packed out more than 1.2 million pounds of raisins during the 2002-03 crop year and more than 1.9 million pounds during the 2003-04 crop year.

Meanwhile, the Hornes also organized these sixty-some growers into the Raisin Valley Marketing Association, an unincorporated association that marketed and sold raisins to wholesale customers on its members' behalf, while the growers maintained ownership over their own raisins. Raisin Valley Marketing then held the sales funds on the growers' behalf in a trust account, from which it paid Lassen

---

[12] This type of arrangement is known as "toll packing." Toll packers do not acquire ownership of the commodity but instead provide a packing service for a fee.

Vineyards its packing fees, paid a third-party broker fee, and distributed the net proceeds to the growers.

III. Proceedings Below

The Administrator of the Agricultural Marketing Service initiated an enforcement action against the Hornes, alleging violations of the AMAA and failure to comply with the Raisin Marketing Order's various requirements. On appeal from an Administrative Law Judge's decision following an on-the-record hearing, the USDA JO found both Raisin Valley Farms and Lassen Vineyards liable for: (1) twenty violations of 7 C.F.R. § 989.73 (filing of inaccurate reports); (2) fifty-eight violations of 7 C.F.R. § 989.58(d) (failing to obtain incoming inspections); (3) 592 violations of 7 C.F.R. § 989.66 and 7 C.F.R. § 989.166 (failing to hold reserve raisins for the 2002-03 and 2003-04 crop years); (4) two violations of 7 C.F.R. § 989.80 (failing to pay assessments to the RAC); and (5) one violation of 7 C.F.R. § 989.77 (failing to allow the Agricultural Marketing Service access to records). The JO accordingly ordered the Hornes to pay (1) $8,783.39 in unpaid assessments for the 2002-03 and 2003-04 crop years, pursuant to 7 C.F.R. § 989.80(a); (2) $483,843.53, the alleged dollar equivalent of the withheld raisin reserve contributions for the 2002-03 (632,427 pounds) and 2003-04 (611,159 pounds[13]) crop years, pursuant to 7 C.F.R. § 989.166(c); and (3) $202,600 in civil penalties, pursuant to 7 U.S.C. § 608c(14)(B).

---

[13] The Hornes do not challenge the JO's calculation of these figures.

The Hornes filed this action in district court seeking judicial review of a final agency decision pursuant to 7 U.S.C. § 608c(14)(B).[14] On cross-motions for summary judgment, the district court granted summary judgment for the USDA, and the Hornes timely appealed.

STANDARDS OF REVIEW

A district court's grant of summary judgment is reviewed de novo. *Ariz. Life Coal., Inc. v. Stanton*, 515 F.3d 956, 962 (9th Cir. 2008). Viewing the evidence in the light most favorable to the non-moving party, we must determine whether any genuine issues of material fact remain and whether the district court correctly applied the relevant substantive law. *Lopez v. Smith*, 203 F.3d 1122, 1131 (9th Cir. 2000) (en banc). We review de novo a constitutional challenge to a federal regulation. *Doe v. Rumsfeld*, 435 F.3d 980, 984 (9th Cir. 2006) (citing *Gonzales v. Metro. Transp. Auth.*, 174 F.3d 1016, 1018 (9th Cir. 1999)). We also review de novo whether a fine is unconstitutionally excessive. *United States v. Mackby*, 339 F.3d 1013, 1016 (9th

---

[14] In a separate action not the subject of this appeal, the Hornes filed an administrative petition before the Secretary of Agriculture in March 2007 pursuant to 7 U.S.C. § 608c(15)(A) challenging the Raisin Marketing Order and its application to them. The JO granted the USDA's motion to dismiss for lack of standing. The Hornes filed a complaint in district court, but the district court dismissed it for lack of subject matter jurisdiction because it was not timely filed, and we affirmed. *See Horne v. U.S. Dep't of Agric.*, 395 Fed. Appx. 486 (9th Cir. Sep. 27, 2010) (unpublished).

Cir. 2003) (*citing United States v. Bajakajian*, 524 U.S. 321, 337 n.10 (1998)).

DISCUSSION

I. Application of the Raisin Marketing Order to the Hornes

For the reasons discussed in the district court's opinion below, we conclude that the Hornes, who admit that their tollpacking business "stems, sorts, cleans," and "packages raisins for market as raisins," 7 C.F.R. § 989.14, satisfy the regulatory definition of a "packer" and are thus "handlers" subject to the Raisin Marketing Order's provisions, *see* 7 C.F.R. § 989.15. *See Horne v. U.S. Dep't of Agric.*, 2009 U.S. Dist. LEXIS 115464, at *20-49 (E.D. Cal. Dec. 11, 2009). The USDA's interpretation of its own regulation is not "plainly erroneous or inconsistent with the regulation" and thus must be given "controlling weight." *See Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945); *accord Auer v. Robbins*, 519 U.S. 452, 461 (1997); *Miller v. Cal. Speedway Corp.*, 536 F.3d 1020, 1028 (9th Cir. 2008). Furthermore, its findings regarding the Hornes' handler operations are supported by substantial evidence and are neither arbitrary nor capricious. *See* 5 U.S.C. § 706(2)(A), (E).

[1] The Hornes argue they are statutorily exempt from regulation because they also satisfy the regulatory definition of a "producer," and the AMAA provides that "[n]o order issued under this chapter shall be applicable to any producer in his capacity as a producer." 7 U.S.C. § 608c(13)(B). However, by expressly limiting the exemption from regulation

only to a producer "in his capacity as a producer," the AMAA contemplates that an individual who performs both producer and handler functions may still be regulated in his capacity as a handler. Even if the AMAA is considered "silent or ambiguous" on the regulation of individuals who perform both producer and handler functions, we must give *Chevron* deference to the permissible interpretation of the Secretary of Agriculture, who is charged with administering the statute. *Chevron, USA, Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984); *see* 7 U.S.C. § 608c(1); *see also Morales-Izquierdo v. Dep't of Homeland Sec.*, 600 F.3d 1076, 1086-87 (9th Cir. 2010); *Midway Farms v. U.S. Dep't of Agric.*, 188 F.3d 1136, 1140 n.5 (9th Cir. 1999). Other courts have similarly rejected the Hornes' argument that a producer who handles his own product for market is statutorily exempt from regulation under the AMAA. *See, e.g., Freeman v. Vance*, 319 F.2d 841, 842 (5th Cir. 1963) (per curiam); *Ideal Farms, Inc. v. Benson*, 288 F.2d 608, 614 (3d Cir. 1961), *cert. denied*, 372 U.S. 965 (1963); *Evans*, 74 Fed. Cl. at 557-58. Deferring to the agency's permissible interpretation of the statute, as we must, we conclude that applying the Raisin Marketing Order to the Hornes in their capacity as handlers was not contrary to the AMAA.

II. Takings Claim

The Hornes argue that, even if they are handlers subject to the Raisin Marketing Order's provisions, the requirement that they contribute a specified percentage of their annual raisin crop to the government-controlled reserve pool constitutes an

uncompensated *per se* taking in violation of the Fifth Amendment.

[2] The Fifth Amendment Takings Clause does not prohibit the government from taking private property; instead, it imposes conditions on the government's authority to act, providing that *when* government takes private property, pursuant to the lawful exercise of its constitutional powers, (1) it must take for public rather than private use, and (2) it must provide owners with just compensation, as measured by the property owner's loss. *See Brown v. Legal Found. of Wash.*, 538 U.S. 216, 231-32, 235-36 (2003); *First English Evangelical Lutheran Church of Glendale v. Cnty. of Los Angeles*, 482 U.S. 304, 314 (1987). The former condition ensures that government does not abuse its powers by taking private property for another's private gain, *see, e.g., Penn. Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922); the latter ensures that even when government acts in the public interest, it does not "forc[e] some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole," *Armstrong v. United States*, 364 U.S. 40, 49 (1960). As a preliminary matter, we must decide whether we have jurisdiction over the Hornes' takings claim.

[3] As we explained in *Bay View, Inc. v. AHTNA, Inc.*, 105 F.3d 1281 (9th Cir. 1997), the just-compensation requirement does not force the government to provide immediate compensation at the time of a taking; "it must simply 'provide an adequate process for obtaining compensation.'" *Id.* at 1285 (quoting *Williamson Cnty. Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 194

(1985)). The Tucker Act allows parties seeking compensation from the United States to bring suit in the Court of Federal Claims. 28 U.S.C. § 1491(a)(1). Thus, a takings claim against the federal government must be brought there in the first instance, "unless Congress has withdrawn the Tucker Act grant of jurisdiction in the relevant statute." *Eastern Enters. v. Apfel*, 524 U.S. 498, 520 (1998) (plurality opinion).

Here, the government contends that the takings claim before us is premature because the Hornes have yet to avail themselves of Tucker Act process available to them in the Court of Federal Claims. The Hornes, however, argue that the AMAA withdraws Tucker Act jurisdiction for takings challenges to AMAA marketing orders and enforcement actions, and that the claim is therefore properly before us.

[4] Section 8c(15) of the AMAA, 7 U.S.C. § 608c(15), "provides an administrative remedy to handlers wishing to challenge marketing orders under the AMAA; requires that the Secretary [of Agriculture] grant a hearing and make a ruling on petitions brought by handlers; and vests the district courts with jurisdiction to review the Secretary's decision." *Lion Raisins, Inc. v. United States*, 416 F.3d 1356, 1370 (Fed. Cir. 2005). The case law the Hornes cite makes clear that when a handler, or a producer-handler in its capacity as a handler, challenges a marketing order on takings grounds, Court of Federal Claims Tucker Act jurisdiction gives way to section 8c(15)'s comprehensive procedural scheme and administrative exhaustion requirements. *See id.* at 1370-71 (holding that raisin producer-

handler asserting a takings claim "only in its capacity as a handler" could effectively bring that claim in section 8c(15) proceedings and that a handler "may not seek compensation in the Court of Federal Claims under the guise of a takings claim for what is essentially a challenge to invalid agency action"); *see also United States v. Ruzicka*, 329 U.S. 287, 292-93, 295 (1946) (holding that a handler's challenges to a marketing order could only be raised using the special statutory procedure provided by section 8c(15)); *cf. Wallace v. Hudson-Duncan & Co.*, 98 F.2d 985 (9th Cir. 1938) (asserting jurisdiction over a handler's claim that a walnut marketing order resulted in a taking of its private property).

[5] However, the takings claim before us is brought by the Hornes not in their capacity as handlers but in their capacity as producers; the Hornes allege that the regulatory scheme at issue takes reserve-tonnage raisins belonging to producers, not property belonging to handlers. This claim is therefore not governed by holdings which address handlers' takings claims, nor is it subject to section 8c(15)'s administrative exhaustion requirements. *See Edaleen Dairy, LLC v. Johanns*, 467 F.3d 778, 783 (D.C. Cir. 2006) (distinguishing suits brought in producer-handlers' capacity as producers from suits brought in their capacity as handlers); *Ark. Dairy-Co-op Ass'n, Inc. v. U.S. Dep't of Agric.*, 573 F.3d 815, 823 n.4 (D.C. Cir. 2009) ("Where a single entity acts as a vertically-integrated 'producer-handler,' it must exhaust [section 8c(15) process] before bringing suit in its capacity as a handler, but not when bringing suit in its capacity as a producer.") (citations omitted).

[6] Nothing in the AMAA precludes the Hornes from alleging in the Court of Federal Claims that the reserve program injures them in their capacity as producers by subjecting them to a taking requiring compensation. Thus, they may bring the takings claim there under the Tucker Act. And since they *may* bring a Tucker Act claim, they are *required* to bring it before we can properly adjudicate the takings issue. *See Bay View*, 105 F.3d at 1285 ("The Tucker Act . . . [is] an implicit promise by Congress to pay compensation for all takings of private property for public purposes. . . . Thus, appellants' takings claim is premature until they have availed themselves of the process provided by the Tucker Act.") (internal quotation marks and citations omitted).

[7] *Bay View* makes clear that we lack jurisdiction to address the merits of the Hornes' takings claim where Congress has provided a means for compensation. The Hornes' takings argument therefore fails.

III. Excessive Fines Claim

Finally, in connection with their takings argument, the Hornes protest the JO's imposition of nearly $700,000 in combined assessments and fines, which they believe excessively penalizes them, in violation of the Eighth Amendment, for their justified refusal to deliver their own private property into the hands of the government. *See* U.S. Const. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.").

[8] To prevail on an excessive fines claim, a plaintiff must establish (1) the assessment is imposed, at least in part, for punitive and not merely remedial purposes, and (2) the fine is excessive, or "grossly disproportional to the gravity of [the] offense" for which it is imposed. *Bajakajian*, 524 U.S. at 334; *see Engquist v. Or. Dep't of Agric.*, 478 F.3d 985, 1006 (9th Cir. 2007); *Mackby*, 339 F.3d at 1016. Although an excessive punitive civil fine is not beyond the Eighth Amendment's reach, *Hudson v. United States*, 522 U.S. 93, 103 (1997), civil forfeiture that merely "provides a reasonable form of liquidated damages" as compensation for government losses resulting from the unlawful activity is remedial, not punitive, and accordingly does not implicate the Eighth Amendment, *One Lot Emerald Cut Stones & One Ring v. United States*, 409 U.S. 232, 237 (1972); *see United States v. $273,969.04 U.S. Currency*, 164 F.3d 462, 466 (9th Cir. 1999); *Austin v. United States*, 509 U.S. 602, 622 n.14 (1993) ("[A] fine that serves purely remedial purposes cannot be considered 'excessive' in any event.").

[9] Here, the district court correctly determined that the $8,783.39 in unpaid assessments imposed pursuant to 7 C.F.R. § 989.80(a) and the $483,843.53 in compensation for the withheld reserve-tonnage raisins imposed pursuant to 7 C.F.R. § 989.166(c) amounted to remedial rather than punitive forfeitures and that the Excessive Fines Clause therefore is inapplicable to those penalties. The JO's order that the Hornes pay assessments to the RAC was calculated solely to compensate the RAC for the mandatory assessments not paid. *See* 7 C.F.R. § 989.80(a) ("Each handler shall, with respect to free tonnage acquired by him . . . pay to the committee,

upon demand, his pro rata share of the expenses . . . which the Secretary finds will be incurred, as aforesaid, by the committee during each crop year . . . .."). Similarly, the JO's order that the Hornes compensate the RAC for the withheld reserve-tonnage raisins flowed inexorably from another remedial, non-punitive provision of the regulations. *See id.* § 989.166(c) ("A handler who fails to deliver to the Committee, upon request, any reserve tonnage raisins in the quantity and quality for which he has become obligated . . . shall compensate the Committee for the amount of the loss resulting from his failure to so deliver," as determined by a fixed formula.). Calculation of the compensation amount is nondiscretionary and is limited by the extent of the government's loss. *Cf. $273,969.04*, 164 F.3d at 466 (inferring punitive nature of a sanction where it was not limited by the extent of the government's loss and was tied to commission of a crime). The JO's use of the "field price" to calculate the compensatory amount the Hornes owed the RAC for their withheld reserve-tonnage raisins was consistent with the regulations. *See* 7 C.F.R. § 989.166(c).

[10] The only sanction that implicates the Excessive Fines Clause is the $202,600 fine imposed pursuant to 7 U.S.C. § 608c(14)(B), but we again agree with the district court that this civil penalty, less than one-third the authorized statutory amount, is not "grossly disproportional to the gravity of [the Hornes'] offense." *Bajakajian*, 524 U.S. at 334. Although we have no set formula for determining the proportionality of a given penalty, relevant factors include the severity of the offense, the statutory maximum penalty available, and the harm caused by the offense. *Mackby*, 339 F.3d at 1016; *see also*

United States v. 3814 NW Thurman St., 164 F.3d 1191, 1197-98 (9th Cir. 1999).

We have previously recognized that noncompliance with a marketing order's reporting and reserve requirements are serious offenses that threaten the Secretary's ability to regulate a given market and prevent price destabilization, while also unjustly enriching the offenders who profit from selling their reserve-tonnage goods on the open market. *See Balice v. U.S. Dep't of Agric.*, 203 F.3d 684, 693, 695, 698-99 (9th Cir. 2000) (upholding a fine of $225,500 imposed on an almond handler subject to up to $528,000 in fines for violations of various reporting and reserve requirements). Furthermore, that Congress authorized a much steeper fine ($1,000 for each of the Hornes' 673 separate offenses spanning a two-year period, for a total of $673,000) than what the JO actually imposed, while not dispositive, weighs heavily against finding the fine grossly disproportional to the Hornes' offense, for "judgments about the appropriate punishment for an offense belong in the first instance to the legislature." *Bajakajian*, 524 U.S. at 336, 339 n.14; *accord Balice*, 203 F.3d at 699.[15] In light of these

---

[15] Although in *Balice* it appears the JO imposed penalties under only 7 U.S.C. § 608c(14) and not under the regulation's forfeiture provisions, whereas here the JO imposed both, nothing in the statutory or regulatory language seems to preclude simultaneous imposition of remedial and punitive sanctions under the respective provisions. To the contrary, 7 C.F.R. § 989.166(c) expressly provides that compensation for failure to deliver reserve-tonnage raisins "shall be in addition to, and not exclusive of, any or all of the remedies or penalties prescribed in the act" for noncompliance with the act or

factors, we cannot say the district court erred in finding the penalties consistent with the Eighth Amendment.[16]

CONCLUSION

The Hornes are clearly dissatisfied and frustrated with a regulatory scheme they believe no longer serves the interests of the farmers it was designed, in large part, to protect. That being the case, the Hornes may wish to pursue a takings claim in the Court of Federal Claims or attempt to impress upon the Secretary the need for reevaluation of the Raisin Marketing Order. *See* 7 U.S.C. § 608c(16) (prescribing mechanism for termination or suspension of marketing orders). Our role, however, is limited to reviewing the constitutionality and not the wisdom of the current regulation. We find no

---

regulation's requirements, and the Hornes do not challenge the legitimacy of this provision.

[16] We also reject the Hornes' contention that 7 U.S.C. § 608c(14)(B) exempts them from liability for their Raisin Marketing Order violations because in 2007 they filed an administrative petition pursuant to 7 U.S.C. § 608c(15)(A). *See* 7 U.S.C. § 608c(14)(B) (immunizing from civil penalty any handler who "in good faith and not for delay" files and prosecutes a qualifying administrative petition). First, this argument was already disposed of in one of our earlier decisions, *see Horne*, 397 Fed. Appx. at 486, and is not properly before us now. Moreover, even if the matter were properly before us, it is without merit. Section 608c(14)(B) only immunizes handlers from penalties otherwise incurred during the pendency of their administrative petition; it does not apply retroactively. Therefore, an administrative petition not filed until 2007 cannot immunize the Hornes from fines relating to their conduct in 2002-04.

constitutional infirmity in either the Raisin Marketing Order or the Secretary's application of it to the Hornes, and indeed lack jurisdiction to find such an infirmity on takings grounds until the Hornes avail themselves of Tucker Act process in the Court of Federal Claims. The summary judgment of the district court is **AFFIRMED.**

28 U.S.C. § 1491

§ 1491. Claims against United States generally; actions involving Tennessee Valley Authority

(a)(1) The United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort. For the purpose of this paragraph, an express or implied contract with the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, or Exchange Councils of the National Aeronautics and Space Administration shall be considered an express or implied contract with the United States.

(2) To provide an entire remedy and to complete the relief afforded by the judgment, the court may, as an incident of and collateral to any such judgment, issue orders directing restoration to office or position, placement in appropriate duty or retirement status, and correction of applicable records, and such orders may be issued to any appropriate official of the United States. In any case within its jurisdiction, the court shall have the power to remand appropriate matters to any administrative or executive body or official with such direction as it may deem proper and just. The Court of Federal Claims shall have jurisdiction to render judgment upon any claim by or

against, or dispute with, a contractor arising under section 7104(b)(1) of title 41, including a dispute concerning termination of a contract, rights in tangible or intangible property, compliance with cost accounting standards, and other nonmonetary disputes on which a decision of the contracting officer has been issued under section 6 of that Act.

(b)(1) Both the Unites States Court of Federal Claims and the district courts of the United States shall have jurisdiction to render judgment on an action by an interested party objecting to a solicitation by a Federal agency for bids or proposals for a proposed contract or to a proposed award or the award of a contract or any alleged violation of statute or regulation in connection with a procurement or a proposed procurement. Both the United States Court of Federal Claims and the district courts of the United States shall have jurisdiction to entertain such an action without regard to whether suit is instituted before or after the contract is awarded.

(2) To afford relief in such an action, the courts may award any relief that the court considers proper, including declaratory and injunctive relief except that any monetary relief shall be limited to bid preparation and proposal costs.

(3) In exercising jurisdiction under this subsection, the courts shall give due regard to the interests of national defense and national security and the need for expeditious resolution of the action.

(4) In any action under this subsection, the courts shall review the agency's decision pursuant to the standards set forth in section 706 of title 5.

(5) If an interested party who is a member of the private sector commences an action described in paragraph (1) with respect to a public-private competition conducted under Office of Management and Budget Circular A-76 regarding the performance of an activity or function of a Federal agency, or a decision to convert a function performed by Federal employees to private sector performance without a competition under Office of Management and Budget Circular A-76, then an interested party described in section 3551(2)(B) of title 31 shall be entitled to intervene in that action.

(6) Jurisdiction over any action described in paragraph (1) arising out of a maritime contract, or a solicitation for a proposed maritime contract, shall be governed by this section and shall not be subject to the jurisdiction of the district courts of the United States under the Suits in Admiralty Act (chapter 309 of title 46) or the Public Vessels Act (chapter 311 of title 46).

(c) Nothing herein shall be construed to give the United States Court of Federal Claims jurisdiction of any civil action within the exclusive jurisdiction of the Court of International Trade, or of any action against, or founded on conduct of, the Tennessee Valley Authority, or to amend or modify the provisions of the Tennessee Valley Authority Act of 1933 with respect to actions by or against the Authority.

7 U.S.C. § 608c

§ 608c. Orders

(1) Issuance by Secretary

The Secretary of Agriculture shall, subject to the provisions of this section, issue, and from time to time amend, orders applicable to processors, associations of producers, and others engaged in the handling of any agricultural commodity or product thereof specified in subsection (2) of this section. Such persons are referred to in this chapter as "handlers". Such orders shall regulate, in the manner hereinafter in this section provided, only such handling of such agricultural commodity, or product thereof, as is in the current of interstate or foreign commerce, or which directly burdens, obstructs, or affects, interstate or foreign commerce in such commodity or product thereof. In carrying out this section, the Secretary shall complete all informal rulemaking actions necessary to respond to recommendations submitted by administrative committees for such orders as expeditiously as possible, but not more than 45 days (to the extent practicable) after submission of the committee recommendations. The Secretary is authorized to implement a producer allotment program and a handler withholding program under the cranberry marketing order in the same crop year through informal rulemaking based on a recommendation and supporting economic analysis submitted by the Cranberry Marketing Committee. Such recommendation and analysis shall be submitted by

the Committee no later than March 1 of each year. The Secretary shall establish time frames for each office and agency within the Department of Agriculture to consider the committee recommendations.

(2) Commodities to which applicable

Orders issued pursuant to this section shall be applicable only to (A) the following agricultural commodities and the products thereof (except canned or frozen pears, grapefruit, cherries, apples, or cranberries, the products of naval stores, and the products of honeybees), or to any regional, or market classification of any such commodity or product: Milk, fruits (including filberts, almonds, pecans and walnuts but not including apples, other than apples produced in the States of Washington, Oregon, Idaho, New York, Michigan, Maryland, New Jersey, Indiana, California, Maine, Vermont, New Hampshire, Rhode Island, Massachusetts, Connecticut, Colorado, Utah, New Mexico, Illinois, and Ohio, and not including fruits for canning or freezing other than pears, olives, grapefruit, cherries, caneberries (including raspberries, blackberries, and loganberries), cranberries, and apples produced in the States named above except Washington, Oregon, and Idaho), tobacco, vegetables (not including vegetables, other than asparagus, for canning or freezing and not including potatoes for canning, freezing, or other processing), hops, honeybees and naval stores as included in the Naval Stores Act [7 U.S.C.A. § 91 et seq.] and standards established thereunder (including refined or partially refined oleoresin): *Provided*, That no order issued pursuant

to this section shall be effective as to any grapefruit for canning or freezing unless the Secretary of Agriculture determines, in addition to other findings and determinations required by this chapter, that the issuance of such order is approved or favored by the processors who, during a representative period determined by the Secretary, have been engaged in canning or freezing such commodity for market and have canned or frozen for market more than 50 per centum of the total volume of such commodity canned or frozen for market during such representative period; and (B) any agricultural commodity (except honey, cotton, rice, wheat, corn, grain sorghums, oats, barley, rye, sugarcane, sugarbeets, wool, mohair, livestock, soybeans, cottonseed, flaxseed, poultry (but not excepting turkeys and not excepting poultry which produce commercial eggs), fruits and vegetables for canning or freezing, including potatoes for canning, freezing, or other processing and apples), or any regional or market classification thereof, not subject to orders under (A) of this subdivision, but not the products (including canned or frozen commodities or products) thereof. No order issued pursuant to this section shall be effective as to cherries, apples, or cranberries for canning or freezing unless the Secretary of Agriculture determines, in addition to other required findings and determinations, that the issuance of such order is approved or favored by processors who, during a representative period determined by the Secretary, have engaged in canning or freezing such commodity for market and have frozen or canned more than 50 per centum of the total volume of the commodity to be regulated which was canned or frozen within the production

area, or marketed within the marketing area, defined in such order, during such representative period. No order issued pursuant to this section shall be applicable to peanuts produced in more than one of the following production areas: the Virginia-Carolina production area, the Southeast production area, and the Southwest production area. If the Secretary determines that the declared policy of this chapter will be better achieved thereby (i) the commodities of the same general class and used wholly or in part for the same purposes may be combined and treated as a single commodity and (ii) the portion of an agricultural commodity devoted to or marketed for a particular use or combination of uses, may be treated as a separate agricultural commodity. All agricultural commodities and products covered hereby shall be deemed specified herein for the purposes of subsections (6) and (7) of this section.

(3) Notice and hearing

Whenever the Secretary of Agriculture has reason to believe that the issuance of an order will tend to effectuate the declared policy of this chapter with respect to any commodity or product thereof specified in subsection (2) of this section, he shall give due notice of and an opportunity for a hearing upon a proposed order.

(4) Finding and issuance of order

After such notice and opportunity for hearing, the Secretary of Agriculture shall issue an order if he finds, and sets forth in such order, upon the evidence

introduced at such hearing (in addition to such other findings as may be specifically required by this section) that the issuance of such order and all of the terms and conditions thereof will tend to effectuate the declared policy of this chapter with respect to such commodity.

(5) Terms--Milk and its products

In the case of milk and its products, orders issued pursuant to this section shall contain one or more of the following terms and conditions, and (except as provided in subsection (7) of this section) no others:

(A) Classifying milk in accordance with the form in which or the purpose for which it is used, and fixing, or providing a method for fixing, minimum prices for each such use classification which all handlers shall pay, and the time when payments shall be made, for milk purchased from producers or associations of producers. Such prices shall be uniform as to all handlers, subject only to adjustments for (1) volume, market, and production differentials customarily applied by the handlers subject to such order, (2) the grade or quality of the milk purchased, and (3) the locations at which delivery of such milk, or any use classification thereof, is made to such handlers. Throughout the 2-year period beginning on the effective date of this sentence (and subsequent to such 2-year period unless modified by amendment to the order involved), the minimum aggregate amount of the adjustments, under clauses (1) and (2) of the preceding sentence, to prices for milk of the highest use classification under orders that are in effect

under this section on December 23, 1985, shall be as follows:

Marketing Area Subject to Order	Minimum Aggregate Dollar Amount of Such Adjustments Per Hundredweight of Milk Having 3.5 Percent Milkfat
New England	$3.24
New York-New Jersey	3.14
Middle Atlantic	3.03
Georgia	3.08
Alabama-West Florida	3.08
Upper Florida	3.58
Tampa Bay	3.88
Southeastern Florida	4.18
Michigan Upper Peninsula	1.35
Southern Michigan	1.75
Eastern Ohio-Western Pennsylvania	1.95
Ohio Valley	2.04
Indiana	2.00
Chicago Regional	1.40
Central Illinois	1.61
Southern Illinois	1.92
Louisville-Lexington-Evansville	2.11
Upper Midwest	1.20
Eastern South Dakota	1.50
Black Hills, South Dakota	2.05
Iowa	1.55
Nebraska-Western Iowa	1.75
Greater Kansas City	1.92
Tennessee Valley	2.77
Nashville, Tennessee	2.52
Paducah, Kentucky	2.39
Memphis, Tennessee	2.77
Central Arkansas	2.77
Fort Smith, Arkansas	2.77
Southwest Plains	2.77
Texas Panhandle	2.49
Lubbock-Plainview, Texas	2.49
Texas	3.28
Greater Louisiana	3.28
New Orleans-Mississippi	3.85
Eastern Colorado	2.73
Western Colorado	2.00

Southwestern Idaho-Eastern Oregon	1.50
Great Basin	1.90
Lake Mead	1.60
Central Arizona	2.52
Rio Grande Valley	2.35
Puget Sound-Inland	1.85
Oregon-Washington	1.95

Effective at the beginning of such two-year period, the minimum prices for milk of the highest use classification shall be adjusted for the locations at which delivery of such milk is made to such handlers.

(B) Providing:

(i) for the payment to all producers and associations of producers delivering milk to the same handler of uniform prices for all milk delivered by them: *Provided*, That, except in the case of orders covering milk products only, such provision is approved or favored by at least three-fourths of the producers who, during a representative period determined by the Secretary of Agriculture, have been engaged in the production for market of milk covered in such order or by producers who, during such representative period, have produced at least three-fourths of the volume of such milk produced for market during such period; the approval required hereunder shall be separate and apart from any other approval or disapproval provided for by this section; or

(ii) for the payment to all producers and associations of producers delivering milk to all handlers of uniform prices for all milk so delivered, irrespective of the uses made of such milk by the

individual handler to whom it is delivered; subject, in either case, only to adjustments for (a) volume, market, and production differentials customarily applied by the handlers subject to such order, (b) the grade or quality of the milk delivered, (c) the locations at which delivery of such milk is made, and (d) a further adjustment, equitably to apportion the total value of the milk purchased by any handler, or by all handlers, among producers and associations of producers, on the basis of their marketings of milk during a representative period of time., [(e) omitted] and (f) a further adjustment, equitably to apportion the total value of milk purchased by any handler or by all handlers among producers on the basis of the milk components contained in their marketings of milk

(C) In order to accomplish the purposes set forth in paragraphs (A) and (B) of this subsection, providing a method for making adjustments in payments, as among handlers (including producers who are also handlers), to the end that the total sums paid by each handler shall equal the value of the milk purchased by him at the prices fixed in accordance with paragraph (A) of this subsection.

(D) Providing that, in the case of all milk purchased by handlers from any producer who did not regularly sell milk during a period of 30 days next preceding the effective date of such order for consumption in the area covered thereby, payments to such producer, for the period beginning with the first regular delivery by such producer and continuing until the end of two full calendar months following the first day of the next succeeding

calendar month, shall be made at the price for the lowest use classification specified in such order, subject to the adjustments specified in paragraph (B) of this subsection.

(E) Providing (i) except as to producers for whom such services are being rendered by a cooperative marketing association, qualified as provided in paragraph (F) of this subsection, for market information to producers and for the verification of weights, sampling, and testing of milk purchased from producers, and for making appropriate deductions therefor from payments to producers, and (ii) for assurance of, and security for, the payment by handlers for milk purchased.

(F) Nothing contained in this subsection is intended or shall be construed to prevent a cooperative marketing association qualified under the provisions of sections 291 and 292 of this title, engaged in making collective sales or marketing of milk or its products for the producers thereof, from blending the net proceeds of all of its sales in all markets in all use classifications, and making distribution thereof to its producers in accordance with the contract between the association and its producers: *Provided*, That it shall not sell milk or its products to any handler for use or consumption in any market at prices less than the prices fixed pursuant to paragraph (A) of this subsection for such milk.

(G) No marketing agreement or order applicable to milk and its products in any marketing area shall prohibit or in any manner limit, in the

case of the products of milk, the marketing in that area of any milk or product thereof produced in any production area in the United States.

(H) Omitted

(I) Establishing or providing for the establishment of research and development projects, and advertising (excluding brand advertising), sales promotion, educational, and other programs designed to improve or promote the domestic marketing and consumption of milk and its products, to be financed by producers in a manner and at a rate specified in the order, on all producer milk under the order. Producer contributions under this subparagraph may be deducted from funds due producers in computing total pool value or otherwise computing total funds due producers and such deductions shall be in addition to the adjustments authorized by paragraph (B) of this subsection. Provision may be made in the order to exempt, or allow suitable adjustments or credits in connection with, milk on which a mandatory checkoff for advertising or marketing research is required under the authority of any State law. Such funds shall be paid to an agency organized by milk producers and producers' cooperative associations in such form and with such methods of operation as shall be specified in the order. Such agency may expend such funds for any of the purposes authorized by this subparagraph and may designate, employ, and allocate funds to persons and organizations engaged in such programs which meet the standards and qualifications specified in the order. All funds collected under this subparagraph shall be separately accounted for and shall be used

only for the purposes for which they were collected. Programs authorized by this subparagraph may be either local or national in scope, or both, as provided in the order, but shall not be international. Order provisions under this subparagraph shall not become effective in any marketing order unless such provisions are approved by producers separately from other order provisions, in the same manner provided for the approval of marketing orders, and may be terminated separately whenever the Secretary makes a determination with respect to such provisions as is provided for the termination of an order in subsection (16)(B) of this section. Disapproval or termination of such order provisions shall not be considered disapproval of the order or of other terms of the order. Notwithstanding any other provision of this chapter, any producer against whose marketings any assessment is withheld or collected under the authority of this subparagraph, and who is not in favor of supporting the research and promotion programs, as provided for herein, shall have the right to demand and receive a refund of such assessment pursuant to the terms and conditions specified in the order.

(J) Providing for the payment, from the total sums payable by all handlers for milk (irrespective of the use classification of such milk) and before computing uniform prices under paragraph (A) and making adjustments in payments under paragraph (C), to handlers that are cooperative marketing associations described in paragraph (F) and to handlers with respect to which adjustments in payments are made under paragraph (C), for services of marketwide benefit, including but not limited to--

(i) providing facilities to furnish additional supplies of milk needed by handlers and to handle and dispose of milk supplies in excess of quantities needed by handlers;

(ii) handling on specific days quantities of milk that exceed the quantities needed by handlers; and

(iii) transporting milk from one location to another for the purpose of fulfilling requirements for milk of a higher use classification or for providing a market outlet for milk of any use classification.

(K) (i) Notwithstanding any other provision of law, milk produced by dairies--

(I) owned or controlled by foreign persons; and

(II) financed by or with the use of bonds the interest on which is exempt from Federal income tax under section 103 of Title 26;

shall be treated as other-source milk, and shall be allocated as milk received from producer-handlers for the purposes of classifying producer milk, under the milk marketing program established under this chapter. For the purposes of this subparagraph, the term "foreign person" has the meaning given such term under section 3508(3) of this title.

(ii) The Secretary of Agriculture shall prescribe regulations to carry out this subparagraph.

(iii) This subparagraph shall not apply with respect to any dairy that began operation before May 6, 1986.

(L) Providing that adjustments in payments by handlers under paragraph (A) need not be the same as adjustments to producers under paragraph (B) with regard to adjustments authorized by subparagraphs (2) and (3) of paragraph (A) and clauses (b), (c), and (d) of paragraph (B)(ii).

(M) Minimum Milk Prices for Handlers

(i) Application of minimum price requirements

Notwithstanding any other provision of this section, a milk handler described in clause (ii) shall be subject to all of the minimum and uniform price requirements of a Federal milk marketing order issued pursuant to this section applicable to the county in which the plant of the handler is located, at Federal order class prices, if the handler has packaged fluid milk product route dispositions, or sales of packaged fluid milk products to other plants, in a marketing area located in a State that requires handlers to pay minimum prices for raw milk purchases.

(ii) Covered milk handlers

Except as provided in clause (iv), clause (i) applies to a handler of Class I milk products (including a

producer-handler or producer operating as a handler) that--

(I) operates a plant that is located within the boundaries of a Federal order milk marketing area (as those boundaries are in effect as of April 11, 2006);

(II) has packaged fluid milk product route dispositions, or sales of packaged fluid milk products to other plants, in a milk marketing area located in a State that requires handlers to pay minimum prices for raw milk purchases; and

(III) is not otherwise obligated by a Federal milk marketing order, or a regulated milk pricing plan operated by a State, to pay minimum class prices for the raw milk that is used for such dispositions or sales.

(iii) Obligation to pay minimum class prices

For purposes of clause (ii)(III), the Secretary may not consider a handler of Class I milk products to be obligated by a Federal milk marketing order to pay minimum class prices for raw milk unless the handler operates the plant as a fully regulated fluid milk distributing plant under a Federal milk marketing order.

(iv) Certain handlers exempted

Clause (i) does not apply to--

(I) a handler (otherwise described in clause (ii)) that operates a nonpool plant (as defined in section 1000.8(e) of title 7, Code of Federal Regulations, as in effect on April 11, 2006);

(II) a producer-handler (otherwise described in clause (ii)) for any month during which the producer-handler has route dispositions, and sales to other plants, of packaged fluid milk products equaling less than 3,000,000 pounds of milk; or

(III) a handler (otherwise described in clause (ii)) for any month during which--

(aa) less than 25 percent of the total quantity of fluid milk products physically received at the plant of the handler (excluding concentrated milk received from another plant by agreement for other than Class I use) is disposed of as route disposition or is transferred in the form of packaged fluid milk products to other plants; or

(bb) less than 25 percent in aggregate of the route disposition or transfers are in a marketing area or areas located in one or more States that require handlers to pay minimum prices for raw milk purchases.

(N) Exemption for Certain Milk Handlers

Notwithstanding any other provision of this section, no handler with distribution of Class I milk products in the marketing area described in Order No. 131 shall be exempt during any month from any

minimum price requirement established by the Secretary under this subsection if the total distribution of Class I products during the preceding month of any such handler's own farm production exceeds 3,000,000 pounds.

(O) Rule of Construction Regarding Producer-Handlers

Subparagraphs (M) and (N) shall not be construed as affecting, expanding, or contracting the treatment of producer-handlers under this subsection except as provided in such subparagraphs.

(6) Terms--Other commodities

In the case of the agricultural commodities and the products thereof, other than milk and its products, specified in subsection (2) of this section orders issued pursuant to this section shall contain one or more of the following terms and conditions, and (except as provided in subsection (7) of this section), no others:

(A) Limiting, or providing methods for the limitation of, the total quantity of any such commodity or product, or of any grade, size, or quality thereof, produced during any specified period or periods, which may be marketed in or transported to any or all markets in the current of interstate or foreign commerce or so as directly to burden, obstruct, or affect interstate or foreign commerce in such commodity or product thereof, during any specified period or periods by all handlers thereof.

(B) Allotting, or providing methods for allotting, the amount of such commodity or product, or any grade, size, or quality thereof, which each handler may purchase from or handle on behalf of any and all producers thereof, during any specified period or periods, under a uniform rule based upon the amounts sold by such producers in such prior period as the Secretary determines to be representative, or upon the current quantities available for sale by such producers, or both, to the end that the total quantity thereof to be purchased, or handled during any specified period or periods shall be apportioned equitably among producers.

(C) Allotting, or providing methods for allotting, the amount of any such commodity or product, or any grade, size, or quality thereof, which each handler may market in or transport to any or all markets in the current of interstate or foreign commerce or so as directly to burden, obstruct, or affect interstate or foreign commerce in such commodity or product thereof, under a uniform rule based upon the amounts which each such handler has available for current shipment, or upon the amounts shipped by each such handler in such prior period as the Secretary determines to be representative, or both, to the end that the total quantity of such commodity or product, or any grade, size, or quality thereof, to be marketed in or transported to any or all markets in the current of interstate or foreign commerce or so as directly to burden, obstruct, or affect interstate or foreign commerce in such commodity or product thereof, during any specified period or periods shall be

equitably apportioned among all of the handlers thereof.

(D) Determining, or providing methods for determining, the existence and extent of the surplus of any such commodity or product, or of any grade, size, or quality thereof, and providing for the control and disposition of such surplus, and for equalizing the burden of such surplus elimination or control among the producers and handlers thereof.

(E) Establishing or providing for the establishment of reserve pools of any such commodity or product, or of any grade, size, or quality thereof, and providing for the equitable distribution of the net return derived from the sale thereof among the persons beneficially interested therein.

(F) Requiring or providing for the requirement of inspection of any such commodity or product produced during specified periods and marketed by handlers.

(G) In the case of hops and their products in addition to, or in lieu of, the foregoing terms and conditions, orders may contain one or more of the following:

(i) Limiting, or providing methods for the limitation of, the total quantity thereof, or of any grade, type, or variety thereof, produced during any specified period or periods, which all handlers may handle in the current of or so as directly to burden,

obstruct, or affect interstate or foreign commerce in hops or any product thereof.

(ii) Apportioning, or providing methods for apportioning, the total quantity of hops of the production of the then current calendar year permitted to be handled equitably among all producers in the production area to which the order applies upon the basis of one or more or a combination of the following: The total quantity of hops available or estimated will become available for market by each producer from his production during such period; the normal production of the acreage of hops operated by each producer during such period upon the basis of the number of acres of hops in production, and the average yield of that acreage during such period as the Secretary determines to be representative, with adjustments determined by the Secretary to be proper for age of plantings or abnormal conditions affecting yield; such normal production or historical record of any acreage for which data as to yield of hops are not available or which had no yield during such period shall be determined by the Secretary on the basis of the yields of other acreage of hops of similar characteristics as to productivity, subject to adjustment as just provided for.

(iii) Allotting, or providing methods for allotting, the quantity of hops which any handler may handle so that the allotment fixed for that handler shall be limited to the quantity of hops apportioned under preceding section (ii) to each respective producer of hops; such allotment shall constitute an allotment fixed for that handler within

the meaning of subsection (5) of section 608a of this title.

(H) providing a method for fixing the size, capacity, weight, dimensions, or pack of the container, or containers, which may be used in the packaging, transportation, sale, shipment, or handling of any fresh or dried fruits, vegetables, or tree nuts: *Provided, however*, That no action taken hereunder shall conflict with the Standard Containers Act of 1916 (15 U.S.C. 251-256) and the Standard Containers Act of 1928 (15 U.S.C. 257-257i);

(I) establishing or providing for the establishment of production research, marketing research and development projects designed to assist, improve, or promote the marketing, distribution, and consumption or efficient production of any such commodity or product, the expense of such projects to be paid from funds collected pursuant to the marketing order: *Provided*, That with respect to orders applicable to almonds, filberts (otherwise known as hazelnuts), California-grown peaches, cherries, papayas, carrots, citrus fruits, onions, Tokay grapes, pears, dates, plums, nectarines, celery, sweet corn, limes, olives, pecans, eggs, avocados, apples, raisins, walnuts, tomatoes, caneberries (including raspberries, blackberries, and loganberries), Florida grown strawberries, or cranberries, such projects may provide for any form of marketing promotion including paid advertising and with respect to almonds, filberts (otherwise known as hazelnuts), raisins, walnuts, olives, Florida Indian River grapefruit, and cranberries may provide

for crediting the pro rata expense assessment obligations of a handler with all or any portion of his direct expenditures for such marketing promotion including paid advertising as may be authorized by the order and when the handling of any commodity for canning or freezing is regulated, then any such projects may also deal with the commodity or its products in canned or frozen form: *Provided further*, That the inclusion in a Federal marketing order of provisions for research and marketing promotion, including paid advertising, shall not be deemed to preclude, preempt or supersede any such provisions in any State program covering the same commodity.

(J) In the case of pears for canning or freezing, any order for a production area encompassing territory within two or more States or portions thereof shall provide that the grade, size, quality, maturity, and inspection regulation under the order applicable to pears grown within any such State or portion thereof may be recommended to the Secretary by the agency established to administer the order only if a majority of the representatives from that State on such agency concur in the recommendation each year.

(7) Terms common to all orders

In the case of the agricultural commodities and the products thereof specified in subsection (2) of this section orders shall contain one or more of the following terms and conditions:

(A) Prohibiting unfair methods of competition and unfair trade practices in the handling thereof.

(B) Providing that (except for milk and cream to be sold for consumption in fluid form) such commodity or product thereof, or any grade, size, or quality thereof shall be sold by the handlers thereof only at prices filed by such handlers in the manner provided in such order.

(C) Providing for the selection by the Secretary of Agriculture, or a method for the selection, of an agency or agencies and defining their powers and duties, which shall include only the powers:

(i) To administer such order in accordance with its terms and provisions;

(ii) To make rules and regulations to effectuate the terms and provisions of such order;

(iii) To receive, investigate, and report to the Secretary of Agriculture complaints of violations of such order; and

(iv) To recommend to the Secretary of Agriculture amendments to such order.

No person acting as a member of an agency established pursuant to this paragraph shall be deemed to be acting in an official capacity, within the meaning of section 610(g) of this title, unless such person receives compensation for his personal services from funds of the United States. There shall be included in the membership of any agency selected to administer a marketing order applicable

to grapefruit for canning or freezing one or more representatives of processors of the commodity specified in such order.

(D) Incidental to, and not inconsistent with, the terms and conditions specified in subsections (5), (6), and (7) of this section and necessary to effectuate the other provisions of such order.

(8) Orders with marketing agreement

Except as provided in subsection (9) of this section, no order issued pursuant to this section shall become effective until the handlers (excluding cooperative associations of producers who are not engaged in processing, distributing, or shipping the commodity or product thereof covered by such order) of not less than 50 per centum of the volume of the commodity or product thereof covered by such order which is produced or marketed within the production or marketing area defined in such order have signed a marketing agreement, entered into pursuant to section 608b of this title, which regulates the handling of such commodity or product in the same manner as such order, except that as to citrus fruits produced in any area producing what is known as California citrus fruits no order issued pursuant to this subsection shall become effective until the handlers of not less than 80 per centum of the volume of such commodity or product thereof covered by such order have signed such a marketing agreement: *Provided*, That no order issued pursuant to this subsection shall be effective unless the Secretary of Agriculture determines that the issuance of such order is approved or favored:

(A) By at least two-thirds of the producers who (except that as to citrus fruits produced in any area producing what is known as California citrus fruits said order must be approved or favored by three-fourths of the producers), during a representative period determined by the Secretary, have been engaged, within the production area specified in such marketing agreement or order, in the production for market of the commodity specified therein, or who, during such representative period, have been engaged in the production of such commodity for sale in the marketing area specified in such marketing agreement, or order, or

(B) By producers who, during such representative period, have produced for market at least two-thirds of the volume of such commodity produced for market within the production area specified in such marketing agreement or order, or who, during such representative period, have produced at least two-thirds of the volume of such commodity sold within the marketing area specified in such marketing agreement or order.

(9) Orders with or without marketing agreement

Any order issued pursuant to this section shall become effective in the event that, notwithstanding the refusal or failure of handlers (excluding cooperative associations of producers who are not engaged in processing, distributing, or shipping the commodity or product thereof covered by such order) of more than 50 per centum of the volume of the commodity or product thereof (except that as to

citrus fruits produced in any area producing what is known as California citrus fruits said per centum shall be 80 per centum) covered by such order which is produced or marketed within the production or marketing area defined in such order to sign a marketing agreement relating to such commodity or product thereof, on which a hearing has been held, the Secretary of Agriculture determines:

(A) That the refusal or failure to sign a marketing agreement (upon which a hearing has been held) by the handlers (excluding cooperative associations of producers who are not engaged in processing, distributing, or shipping the commodity or product thereof covered by such order) of more than 50 per centum of the volume of the commodity or product thereof (except that as to citrus fruits produced in any area producing what is known as California citrus fruits said per centum shall be 80 per centum) specified therein which is produced or marketed within the production or marketing area specified therein tends to prevent the effectuation of the declared policy of this chapter with respect to such commodity or product, and

(B) That the issuance of such order is the only practical means of advancing the interests of the producers of such commodity pursuant to the declared policy, and is approved or favored:

(i) By at least two-thirds of the producers (except that as to citrus fruits produced in any area producing what is known as California citrus fruits said order must be approved or favored by three-fourths of the producers) who, during a

representative period determined by the Secretary, have been engaged, within the production area specified in such marketing agreement or order, in the production for market of the commodity specified therein, or who, during such representative period, have been engaged in the production of such commodity for sale in the marketing area specified in such marketing agreement, or order, or

(ii) By producers who, during such representative period, have produced for market at least two-thirds of the volume of such commodity produced for market within the production area specified in such marketing agreement or order, or who, during such representative period, have produced at least two-thirds of the volume of such commodity sold within the marketing area specified in such marketing agreement or order.

(10) Manner of regulation and applicability

No order shall be issued under this section unless it regulates the handling of the commodity or product covered thereby in the same manner as, and is made applicable only to persons in the respective classes of industrial or commercial activity specified in, a marketing agreement upon which a hearing has been held. No order shall be issued under this chapter prohibiting, regulating, or restricting the advertising of any commodity or product covered thereby, nor shall any marketing agreement contain any provision prohibiting, regulating, or restricting the advertising of any commodity, or product covered by such marketing agreement.

(11) Regional application

(A) No order shall be issued under this section which is applicable to all production areas or marketing areas, or both, of any commodity or product thereof unless the Secretary finds that the issuance of several orders applicable to the respective regional production areas or regional marketing areas, or both, as the case may be, of the commodity or product would not effectively carry out the declared policy of this chapter.

(B) Except in the case of milk and its products, orders issued under this section shall be limited in their application to the smallest regional production areas or regional marketing areas, or both, as the case may be, which the Secretary finds practicable, consistently with carrying out such declared policy.

(C) All orders issued under this section which are applicable to the same commodity or product thereof shall, so far as practicable, prescribe such different terms, applicable to different production areas and marketing areas, as the Secretary finds necessary to give due recognition to the differences in production and marketing of such commodity or product in such areas.

(D) In the case of milk and its products, no county or other political subdivision of the State of Nevada shall be within the marketing area definition of any order issued under this section.

(12) Cooperative association representation

Whenever, pursuant to the provisions of this section, the Secretary is required to determine the approval or disapproval of producers with respect to the issuance of any order, or any term or condition thereof, or the termination thereof, the Secretary shall consider the approval or disapproval by any cooperative association of producers, bona fide engaged in marketing the commodity or product thereof covered by such order, or in rendering services for or advancing the interests of the producers of such commodity, as the approval or disapproval of the producers who are members of, stockholders in, or under contract with, such cooperative association of producers.

(13) Retailer and producer exemption

(A) No order issued under subsection (9) of this section shall be applicable to any person who sells agricultural commodities or products thereof at retail in his capacity as such retailer, except to a retailer in his capacity as a retailer of milk and its products.

(B) No order issued under this chapter shall be applicable to any producer in his capacity as a producer.

(14) Violation of order

(A) Any handler subject to an order issued under this section, or any officer, director, agent, or employee of such handler, who violates any provision of such order shall, on conviction, be fined not less

than $50 or more than $5,000 for each such violation, and each day during which such violation continues shall be deemed a separate violation. If the court finds that a petition pursuant to subsection (15) of this section was filed and prosecuted by the defendant in good faith and not for delay, no penalty shall be imposed under this subsection for such violations as occurred between the date upon which the defendant's petition was filed with the Secretary, and the date upon which notice of the Secretary's ruling thereon was given to the defendant in accordance with regulations prescribed pursuant to subsection (15) of this section.

(B) Any handler subject to an order issued under this section, or any officer, director, agent, or employee of such handler, who violates any provision of such order may be assessed a civil penalty by the Secretary not exceeding $1,000 for each such violation. Each day during which such violation continues shall be deemed a separate violation, except that if the Secretary finds that a petition pursuant to paragraph (15) was filed and prosecuted by the handler in good faith and not for delay, no civil penalty may be assessed under this paragraph for such violations as occurred between the date on which the handler's petition was filed with the Secretary, and the date on which notice of the Secretary's ruling thereon was given to the handler in accordance with regulations prescribed pursuant to paragraph (15). The Secretary may issue an order assessing a civil penalty under this paragraph only after notice and an opportunity for an agency hearing on the record. Such order shall be treated as a final order reviewable in the district courts of the

United States in any district in which the handler subject to the order is an inhabitant, or has the handler's principal place of business. The validity of such order may not be reviewed in an action to collect such civil penalty.

(15) Petition by handler and review

(A) Any handler subject to an order may file a written petition with the Secretary of Agriculture, stating that any such order or any provision of any such order or any obligation imposed in connection therewith is not in accordance with law and praying for a modification thereof or to be exempted therefrom. He shall thereupon be given an opportunity for a hearing upon such petition, in accordance with regulations made by the Secretary of Agriculture, with the approval of the President. After such hearing, the Secretary shall make a ruling upon the prayer of such petition which shall be final, if in accordance with law.

(B) The District Courts of the United States in any district in which such handler is an inhabitant, or has his principal place of business, are hereby vested with jurisdiction in equity to review such ruling, provided a bill in equity for that purpose is filed within twenty days from the date of the entry of such ruling. Service of process in such proceedings may be had upon the Secretary by delivering to him a copy of the bill of complaint. If the court determines that such ruling is not in accordance with law, it shall remand such proceedings to the Secretary with directions either (1) to make such ruling as the court shall determine to be in

accordance with law, or (2) to take such further proceedings as, in its opinion, the law requires. The pendency of proceedings instituted pursuant to this subsection (15) shall not impede, hinder, or delay the United States or the Secretary of Agriculture from obtaining relief pursuant to section 608a(6) of this title. Any proceedings brought pursuant to section 608a(6) of this title (except where brought by way of counterclaim in proceedings instituted pursuant to this subsection (15)) shall abate whenever a final decree has been rendered in proceedings between the same parties, and covering the same subject matter, instituted pursuant to this subsection (15).

(16) Termination of orders and marketing agreements

(A) (i) Except as provided in clause (ii), the Secretary of Agriculture shall, whenever he finds that any order issued under this section, or any provision thereof, obstructs or does not tend to effectuate the declared policy of this chapter, terminate or suspend the operation of such order or such provision thereof.

(ii) The Secretary may not terminate any order issued under this section for a commodity for which there is no Federal program established to support the price of such commodity unless the Secretary gives notice of, and a statement of the reasons relied upon by the Secretary for, the proposed termination of such order to the Committee on Agriculture, Nutrition, and Forestry of the Senate and the Committee on Agriculture of the House of

Representatives not later than 60 days before the date such order will be terminated.

(B) The Secretary shall terminate any marketing agreement entered into under section 608b of this title, or order issued under this section, at the end of the then current marketing period for such commodity, specified in such marketing agreement or order, whenever he finds that such termination is favored by a majority of the producers who, during a representative period determined by the Secretary, have been engaged in the production for market of the commodity specified in such marketing agreement or order, within the production area specified in such marketing agreement or order, or who, during such representative period, have been engaged in the production of such commodity for sale within the marketing area specified in such marketing agreement or order: *Provided*, That such majority have, during such representative period, produced for market more than 50 per centum of the volume of such commodity produced for market within the production area specified in such marketing agreement or order, or have, during such representative period, produced more than 50 per centum of the volume of such commodity sold in the marketing area specified in such marketing agreement or order, but such termination shall be effective only if announced on or before such date (prior to the end of the then current marketing period) as may be specified in such marketing agreement or order.

(C) Except as otherwise provided in this subsection with respect to the termination of an

order issued under this section, the termination or suspension of any order or amendment thereto or provision thereof, shall not be considered an order within the meaning of this section.

(17) Provisions applicable to amendments

(A) Applicability to amendments

The provisions of this section and section 608d of this title applicable to orders shall be applicable to amendments to orders.

(B) Supplemental rules of practice

(i) In general

Not later than 60 days after the date of enactment of this subparagraph, the Secretary shall issue, using informal rulemaking, supplemental rules of practice to define guidelines and timeframes for the rulemaking process relating to amendments to orders.

(ii) Issues

At a minimum, the supplemental rules of practice shall establish--

(I) proposal submission requirements;

(II) pre-hearing information session specifications;

(III) written testimony and data request requirements;

(IV) public participation timeframes; and

(V) electronic document submission standards.

(iii) Effective date

The supplemental rules of practice shall take effect not later than 120 days after the date of enactment of this subparagraph, as determined by the Secretary.

(C) Hearing timeframes

(i) In general

Not more than 30 days after the receipt of a proposal for an amendment hearing regarding a milk marketing order, the Secretary shall--

(I) issue a notice providing an action plan and expected timeframes for completion of the hearing not more than 120 days after the date of the issuance of the notice;

(II) (aa) issue a request for additional information to be used by the Secretary in making a determination regarding the proposal; and

(bb) if the additional information is not provided to the Secretary within

the timeframe requested by the Secretary, issue a denial of the request; or

(III) issue a denial of the request.

(ii) Requirement

A post-hearing brief may be filed under this paragraph not later than 60 days after the date of an amendment hearing regarding a milk marketing order.

(iii) Recommended decisions

A recommended decision on a proposed amendment to an order shall be issued not later than 90 days after the deadline for the submission of post-hearing briefs.

(iv) Final decisions

A final decision on a proposed amendment to an order shall be issued not later than 60 days after the deadline for submission of comments and exceptions to the recommended decision issued under clause (iii).

(D) Industry assessments

If the Secretary determines it is necessary to improve or expedite rulemaking under this subsection, the Secretary may impose an assessment on the affected industry to supplement appropriated funds for the procurement of service providers, such as court reporters.

(E) Use of informal rulemaking

The Secretary may use rulemaking under section 553 of Title 5 to amend orders, other than provisions of orders that directly affect milk prices.

(F) Avoiding duplication

The Secretary shall not be required to hold a hearing on any amendment proposed to be made to a milk marketing order in response to an application for a hearing on the proposed amendment if--

(i) the application requesting the hearing is received by the Secretary not later than 90 days after the date on which the Secretary has announced the decision on a previously proposed amendment to that order; and

(ii) the 2 proposed amendments are essentially the same, as determined by the Secretary.

(G) Monthly feed and fuel costs for make allowances

As part of any hearing to adjust make allowances under marketing orders commencing prior to September 30, 2012, the Secretary shall--

(i) determine the average monthly prices of feed and fuel incurred by dairy producers in the relevant marketing area;

(ii) consider the most recent monthly feed and fuel price data available; and

(iii) consider those prices in determining whether or not to adjust make allowances.

(18) Milk prices

The Secretary of Agriculture, prior to prescribing any term in any marketing agreement or order, or amendment thereto, relating to milk or its products, if such term is to fix minimum prices to be paid to producers or associations of producers, or prior to modifying the price fixed in any such term, shall ascertain the parity prices of such commodities. The prices which it is declared to be the policy of Congress to establish in section 602 of this title shall, for the purposes of such agreement, order, or amendment, be adjusted to reflect the price of feeds, the available supplies of feeds, and other economic conditions which affect market supply and demand for milk or its products in the marketing area to which the contemplated marketing agreement, order, or amendment relates. Whenever the Secretary finds, upon the basis of the evidence adduced at the hearing required by section 608b of this title or this section, as the case may be, that the parity prices of such commodities are not reasonable in view of the price of feeds, the available supplies of feeds, and other economic conditions which affect market supply and demand for milk and its products in the marketing area to which the contemplated agreement, order, or amendment relates, he shall fix such prices as he finds will reflect such factors,

insure a sufficient quantity of pure and wholesome milk, and be in the public interest. Thereafter, as the Secretary finds necessary on account of changed circumstances, he shall, after due notice and opportunity for hearing, make adjustments in such prices.

(19) Producer referendum

For the purpose of ascertaining whether the issuance of an order is approved or favored by producers or processors, as required under the applicable provisions of this chapter, the Secretary may conduct a referendum among producers or processors and in the case of an order other than an amendatory order shall do so. The requirements of approval or favor under any such provision shall be held to be complied with if, of the total number of producers or processors, or the total volume of production, as the case may be, represented in such referendum, the percentage approving or favoring is equal to or in excess of the percentage required under such provision. The terms and conditions of the proposed order shall be described by the Secretary in the ballot used in the conduct of the referendum. The nature, content, or extent of such description shall not be a basis for attacking the legality of the order or any action relating thereto. Nothing in this subsection shall be construed as limiting representation by cooperative associations as provided in subsection (12) of this section. For the purpose of ascertaining whether the issuance of an order applicable to pears for canning or freezing is approved or favored by producers as required under the applicable provisions of this chapter, the

Secretary shall conduct a referendum among producers in each State in which pears for canning or freezing are proposed to be included within the provisions of such marketing order and the requirements of approval or favor under any such provisions applicable to pears for canning or freezing shall be held to be complied with if, of the total number of producers, or the total volume of production, as the case may be, represented in such referendum, the percentage approving or favoring is equal to or in excess of 66 2/3 per centum except that in the event that pear producers in any State fail to approve or favor the issuance of any such marketing order, it shall not be made effective in such State.

7 C.F.R. § 989.11

§ 989.11 Producer.

Producer means any person engaged in a proprietary capacity in the production of grapes which are sun-dried or dehydrated by artificial means until they become raisins: *Provided*, That a "producer" shall include any person whose production unit has qualified for diversion under a diversion program announced by the Committee.

7 C.F.R. § 989.15

§ 989.15 Handler.

Handler means: (a) Any processor or packer; (b) any person who places, ships, or continues natural condition raisins in the current of commerce from within the area to any point outside thereof; (c) any person who delivers off-grade raisins, other failing raisins or raisin residual material to other than a packer or other than into any eligible non-normal outlet; or (d) any person who blends raisins: *Provided*, That blending shall not cause a person not otherwise a handler to be a handler on account of such blending if he is either: (1) A producer who, in his capacity as a producer, blends raisins entirely of his own production in the course of his usual and customary practices of preparing raisins for delivery to processors, packers, or dehydrators; (2) a person who blends raisins after they have been placed in trade channels by a packer with other such raisins in trade channels; or (3) a dehydrator who, in his

capacity as a dehydrator, blends raisins entirely of his own manufacture.

PETITIONER'S BRIEF

RECORD
AND
BRIEFS

Supreme Court, U.S.
FILED
JAN 11 2013
OFFICE OF THE CLERK

No. 12-123

In the Supreme Court of the United States

MARVIN D. HORNE, ET AL.,

Petitioners,

v.

UNITED STATES DEPARTMENT OF AGRICULTURE,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR PETITIONERS

BRIAN C. LEIGHTON
Attorney at Law
701 Pollasky Avenue
Clovis, CA 93612
(559) 297-6190

MICHAEL W. MCCONNELL*
ADITYA BAMZAI
JOSEPH CASCIO
AARON L. NIELSON
Kirkland & Ellis LLP
655 Fifteenth Street, NW
Washington, DC 20005
(202) 879-5000
michael.mcconnell@kirkland.com
**Counsel of Record*

Counsel for Petitioners

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

Library of Congress
Law Library

QUESTIONS PRESENTED

1. Whether a party may raise the Takings Clause as a defense to enjoin a "direct transfer of funds mandated by the Government." *Eastern Enterprises* v. *Apfel*, 524 U.S. 498, 521 (1998) (plurality; quotation marks omitted).

2. Whether the federal courts have jurisdiction over petitioners' takings claim, where petitioners, as "handlers" of raisins under the Raisin Marketing Order, 7 C.F.R. Part 989, are statutorily required to exhaust all claims and defenses in administrative proceedings with exclusive jurisdiction for review in federal district court.

RULE 14.1(b) STATEMENT

Petitioners are Marvin D. Horne, Laura R. Horne, d.b.a. Raisin Valley Farms, a partnership, and d.b.a. Raisin Valley Farms Marketing Association, a.k.a. Raisin Valley Marketing, an unincorporated association; the Estate of Don Durbahn* and the Estate of Rena Durbahn, d.b.a. Lassen Vineyards, a partnership, plaintiffs-appellants below.

Respondent is the United States Department of Agriculture, defendant-appellee below.

---

* Mr. Durbahn, a party to the appeal below, died on July 15, 2012. Petitioners have therefore substituted his Estate as a party.

RULE 29.6 STATEMENT

Petitioners have no parent corporations and no publicly held corporation owns 10% or more of their stock.

TABLE OF CONTENTS

Page(s)

QUESTIONS PRESENTED i

RULE 14.1(b) STATEMENT ii

RULE 29.6 STATEMENT iii

TABLE OF AUTHORITIES vi

BRIEF FOR PETITIONERS 1

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL & STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 2

A. Statutory and regulatory framework. 4

B. Proceedings below. 8

SUMMARY OF ARGUMENT 14

ARGUMENT 16

I. The federal courts have jurisdiction to address petitioners' defense under the Takings Clause to a "direct transfer of funds mandated by the Government." 16

A. Petitioners' takings claim is ripe 17

1. An injunctive claim against a "direct transfer of funds mandated by the government" is immediately ripe. 17

2. A defense to government-initiated enforcement action is immediately ripe. 22

B. The Court should clarify that the availability of equitable relief under the Takings Clause depends on traditional principles of equity rather than ripeness. 27

1. The historical understanding of the Constitution establishes that equitable principles govern the availability of equitable relief under the Takings Clause..... 28

2. A party need not pursue pointless duplicative proceedings before obtaining injunctive redress under the Takings Clause..... 42

3. A party may invoke the Takings Clause as a defense to government-initiated enforcement action. 43

II. Under the AMAA, petitioners have the right and obligation to bring their takings claim in administrative proceedings rather than in the Court of Federal Claims under the Tucker Act. 47

CONCLUSION 56

TABLE OF AUTHORITIES

Page(s)

Cases

Abbott Labs. v. *Gardner*,
387 U.S. 136 (1967) 23, 24

Ali v. *Fed. Bureau of Prisons*,
552 U.S. 214 (2008) 52

Arbaugh v. *Y & H Corp.*,
546 U.S. 500 (2006) 42

Asociación de Subscripción Conjunta del Seguro de Responsabilidad Obligatorio v. *Flores Galarza*,
484 F.3d 1 (1st Cir. 2007) 18

Atchison, Topeka, & Santa Fe Ry. v. *O'Connor*,
223 U.S. 280 (1912) 46

Babbitt v. *Youpee*,
519 U.S. 234 (1997) 19

Baring v. *Erdman*,
2 F. Cas. 784 (C.C.E.D. Pa. 1834) 31

Bay View, Inc. v. *AHTNA, Inc.*,
105 F.3d 1281 (9th Cir. 1997) 13

Block v. *Cmty. Nutrition Inst.*,
467 U.S. 340 (1984) 49, 53

Bloodgood v. *Mohawk & Hudson R.R.*,
18 Wend. 9 (N.Y. 1837) 32

Bonaparte v. *Camden & A.R. Co.*,
3 F. Cas. 821 (C.C.N.J. 1830) 30, 31

Bowen v. *Massachusetts*,
487 U.S. 879 (1988) 8

Bragg v. *Weaver*,
251 U.S. 57 (1919) 34

Brown Shoe Co. v. *United States*,
370 U.S. 294 (1962) 25

Brown v. *Legal Found. of Wash.*,
538 U.S. 216 (2003) 18

Cal. Pac. R.R. v. *Cent. Pac. R.R. of Cal.*,
47 Cal. 528 (1874) 44

Califano v. *Sanders*,
430 U.S. 99 (1977) 24

Cherokee Nation v. *S. Kansas Ry.*,
135 U.S. 641 (1890) 17, 33, 34, 35, 42

Chicago, Burlington, & Quincy Ry. v. *Illinois*,
200 U.S. 561 (1906) 25, 44

City of Monterey v. *Del Monte Dunes at Monterey, Ltd.*,
526 U.S. 687 (1999) 18

Concrete Pipe & Prods. of Cal., Inc. v. *Constr. Laborers Pension Trust for S. Cal.*,
508 U.S. 602 (1993) 19

Conn. River R.R. v. *Franklin Cnty. Commr's*,
127 Mass. 50 (1879) 35

Connolly v. *Pension Benefit Guar. Corp.*,
475 U.S. 211 (1986) 19

D.M. Osborne & Co. v. *Missouri Pac. Ry.*,
147 U.S. 248 (1893) 33

Dohany v. *Rogers*,
281 U.S. 362 (1930) 34

Dolan v. *City of Tigard*,
512 U.S. 374 (1994) 46

Douglas v. *Indep. Living Ctr. of S. Cal., Inc.*,
132 S. Ct. 1204 (2012) 45

Duke Power Co. v. *Carolina Envtl. Study Grp., Inc.*,
438 U.S. 59 (1978) 38

Eastern Enterprises v. *Apfel*,
524 U.S. 498 (1998) 13, 14, 16, 17, 18,
..... 19, 20, 21, 26, 42, 47, 48

Elgin v. *Dep't of Treasury*,
132 S. Ct. 2126 (2012) 50

Evans v. *United States*,
74 Fed. Cl. 554 (2006) 4

Ex parte Tyler,
149 U.S. 164 (1893) 34

Ex parte Young,
209 U.S. 123 (1908) 15, 34, 45, 46

FCC v. *Florida Power Corp.*,
480 U.S. 245 (1987) 25

Fed. Power Comm'n v. *Hope Natural Gas Co.*,
320 U.S. 591 (1944) 32

Griffing v. *Gibb*,
67 U.S. 519 (1862) 31

Harrison v. *PPG Indus., Inc.*,
446 U.S. 578 (1980) 52

Hertz Corp. v. *Friend*,
130 S. Ct. 1181 (2010) 55

Hinck v. *United States*,
550 U.S. 501 (2007) 48, 49

Hodel v. *Irving*,
481 U.S. 704 (1987) 19

Hughes Aircraft Co. v. *Jacobson*,
525 U.S. 432 (1999) 53

Hurley v. *Kincaid*,
285 U.S. 95 (1932) 36

In re Chateaugay Corp.,
53 F.3d 478 (2d Cir. 1995) 18

Int'l Paper Co. v. *Ouellette*,
479 U.S. 481 (1987) 55

Joslin Mfg. Co. v. *City of Providence*,
262 U.S. 668 (1923) 34

Kaiser Aetna v. *United States*,
444 U.S. 164 (1979) 24

Kloeckner v. *Solis*,
133 S. Ct. 596 (2012) 55

Kontrick v. *Ryan*,
540 U.S. 443 (2004) 42

Lambert v. *California*,
355 U.S. 225 (1957) 46

Langford v. *United States*,
101 U.S. 341 (1879) 37

Leader v. *Moxon*, 96 Eng. Rep. 546 (C.P. 1773),
reported sub nom. Leader v. *Moxton*,
95 Eng. Rep. 1156 29

Lion Raisins, Inc. v. *United States*,
416 F.3d 1356 (Fed. Cir. 2005) 47, 48, 50, 51

Loretto v. *Teleprompter Manhattan CATV Corp.*,
458 U.S. 419 (1982) 11

Lucas v. *South Carolina Coastal Council*,
505 U.S. 1003 (1992) 43

MacDonald, Sommer, & Frates v. *Yolo Cnty.*,
477 U.S. 340 (1986) 18, 43

Macfarland v. *Poulos*,
32 App. D.C. 558 (D.C. Cir. 1909) 35

McIntyre v. *Ohio Elections Comm'n*,
514 U.S. 334 (1995) 21

Miller v. *Schoene*,
276 U.S. 272 (1928) 24

Missouri Pac. Ry. v. *Nebraska*,
217 U.S. 196 (1910) 16, 21, 23, 24, 43, 46, 47

Missouri v. *Chicago, Burlington, & Quincy R.R.*,
241 U.S. 533 (1916) 46

Mitchell v. *United States*,
267 U.S. 341 (1925) 36

OPM v. *Richmond*,
496 U.S. 414 (1990) 8

Palazzolo v. *Rhode Island*,
533 U.S. 606 (2001) 18, 43

Peabody v. *United States*,
231 U.S. 530 (1913) 37

Penn Cent. Transp. Co. v. *City of New York*,
438 U.S. 104 (1978) 38

Perry v. *Wilson*,
7 Mass. 393 (1811) 32

Phillips v. *Wash. Legal Found.*,
524 U.S. 156 (1998) 18

Phillips v. *Wash. Legal Found.*,
538 U.S. 942 (2003) 18

Portsmouth Harbor Land & Hotel Co. v. *United States*,
250 U.S. 1 (1919) 37

Preseault v. *Interstate Commerce Comm'n*,
494 U.S. 1 (1990) 41

Pruneyard Shopping Ctr. v. *Robins*,
447 U.S. 74 (1980) 25

Pumpelly v. *Green Bay & Miss. Canal Co.*,
80 U.S. 166 (1871) 33

Reg'l Rail Reorganization Act Cases,
419 U.S. 102 (1974) 22, 27, 38, 39

Ruckelshaus v. *Monsanto Co.*,
467 U.S. 986 (1984) 39, 40

Sackett v. *EPA*,
132 S. Ct. 1367 (2012) 26

San Mateo Waterworks v. *Sharpstein*,
50 Cal. 284 (1875) 30, 44

San Remo Hotel, L.P. v. *City & County of S.F.*,
545 U.S. 323 (2005) 41

Sanborn v. *Belden*,
51 Cal. 266 (1876) 44

Saulsbury Orchards & Almond Processing, Inc. v. *Yeutter*,
917 F.2d 1190 (9th Cir. 1990) 53

Schillinger v. *United States*,
155 U.S. 163 (1894) 37

Scott v. *Donald*,
165 U.S. 107 (1897) 34

Sinnickson v. *Johnson*,
17 N.J.L. 129 (1839) 32

Smyth v. *Ames*,
169 U.S. 466 (1898) 32

St. Louis & S.F. Ry. v. *Gill*,
156 U.S. 667 (1895) 25, 44, 46

Steffel v. *Thompson*,
415 U.S. 452 (1974) 22

Stop the Beach Renourishment, Inc. v. *Florida Dep't of Envtl. Prot.*,
130 S. Ct. 2592 (2010) 42

Student Loan Mktg. Ass'n v. *Riley*,
104 F.3d 397 (D.C. Cir. 1997) 18

Suitum v. *Tahoe Reg'l Planning Agency*,
520 U.S. 725 (1997) 19, 42

Sweet v. *Rechel*,
159 U.S. 380 (1895) 35

Tempel v. *United States*,
248 U.S. 121 (1918) 36

Thacher v. *Dartmouth Bridge Co.*,
35 Mass. (18 Pick.) 501 (1836) 32

Tindal v. *Wesley*,
167 U.S. 204 (1897) 32

Tull v. *United States*,
481 U.S. 412 (1987) 50

Union Bridge Co. v. *United States*,
204 U.S. 364 (1907) 24, 44

United States v. *Bormes*,
133 S. Ct. 12 (2012) 7, 8, 48, 49

United States v. *Causby*,
328 U.S. 256 (1946) 37

United States v. *Erika, Inc.*,
456 U.S. 201 (1982) 49

United States v. *Fausto*,
484 U.S. 439 (1988) 49, 50

United States v. *Gonzales*,
520 U.S. 1 (1997) 52

United States v. *Great Falls Mfg. Co.*,
112 U.S. 645 (1884) 37

United States v. *Lee*,
106 U.S. 196 (1882) 33, 37

United States v. *Mitchell*,
463 U.S. 206 (1983) 8

United States v. *Nixon*,
418 U.S. 683 (1974) 53

United States v. *Riverside Bayview Homes, Inc.*,
474 U.S. 121 (1985) 26

United States v. *Ruzicka*,
329 U.S. 287 (1946) 7, 10, 48, 50

United States v. *Sioux Nation of Indians*,
448 U.S. 371 (1980) 35

United States v. *Testan*,
424 U.S. 392 (1976) 8

Va. Office for Prot. & Advocacy v. *Stewart*,
131 S. Ct. 1632 (2011) 45

Wash. Legal Found. v. *Tex. Equal Access to Justice Found.*,
270 F.3d 180 (5th Cir. 2001) 18

Washlefske v. *Winston*,
234 F.3d 179 (4th Cir. 2000) 18

Webb's Fabulous Pharmacies v. *Beckwith*,
449 U.S. 155 (1980) 19

Western Union Tel. v. *Pa. R.R.*,
195 U.S. 540 (1904) 35

Wilkie v. *Robbins*,
551 U.S. 537 (2007) 21

Williamson Cnty. Reg'l Planning Comm'n v.
Hamilton Bank,
473 U.S. 172 (1985) 13, 40, 41, 42

Wisconsin v. *Yoder*,
406 U.S. 205 (1972) 23, 46

Yates v. *City of Milwaukee*,
77 U.S. 497 (1870) 32

Younger v. *Harris*,
401 U.S. 37 (1971) 22

Youngstown Sheet & Tube Co. v. *Sawyer*,
343 U.S. 579 (1952) 38

Zinermon v. *Burch*,
494 U.S. 113 (1990) 29

Statutes and Regulations

7 U.S.C. § 601 1

7 U.S.C. § 608c(1) 52

7 U.S.C. § 608c(13)(B) 51

7 U.S.C. § 608c(14) 7, 10, 24, 49, 50, 51, 52

7 U.S.C. § 608c(15) 7, 49, 52

7 U.S.C. § 608c(19) 5

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1491(a)(1) 1, 8, 37

7 C.F.R. § 900.51(i) 7, 53
7 C.F.R. § 989 2
7 C.F.R. § 989.11 5
7 C.F.R. § 989.15 ..... 5, 52
7 C.F.R. § 989.21 5
7 C.F.R. § 989.54 ..... 4, 10
7 C.F.R. § 989.54(d) 5
7 C.F.R. § 989.55 4
7 C.F.R. § 989.65 ..... 4, 5
7 C.F.R. § 989.66 ..... 4, 5, 10
7 C.F.R. § 989.66(a) 5
7 C.F.R. § 989.66(b)(1) 5
7 C.F.R. § 989.66(b)(4) 6
7 C.F.R. § 989.67 6
7 C.F.R. § 989.80(a) 10
7 C.F.R. § 989.166 ..... 5, 10
7 C.F.R. § 989.166(c) 20

Constitutional Provisions

U.S. CONST. amend. V 1, 28

Other Authorities

Blackstone, William,
Commentaries on the Laws of England (1765) 28

Brauneis, Robert,
The First Constitutional Tort: The Remedial Revolution in Nineteenth-Century State Just Compensation Law,
52 VAND. L. REV. 57 (1999) 30

Breyer, Stephen G. *et al.*,
Administrative Law and Regulatory Policy (7th ed. 2011) 24

Chemerinsky, Erwin,
Federal Jurisdiction (5th ed. 2007) 23

Harrison, John,
Ex parte Young,
60 STAN. L. REV. 989 (2008) 45

Laycock, Douglas,
Modern American Remedies (4th ed. 2010) 36

Lewis, John,
A Treatise on the Law of Eminent Domain in the United States (1888) 32, 35

Magna Charta (1215) 28

Pierce, Jr., Richard J., *et al.*,
Administrative Law and Process (5th ed. 2009) 24

Pomeroy, John Norton,
A Treatise on Equity Jurisprudence as Administered in the United States of America (4th ed. 1919) 34

Raisin Administrative Committee,
Analysis Report (Aug. 1, 2006) 6

Raisin Administrative Committee,
Marketing Policy and Industry Statistics, 2010 6

Webster's Third New Int'l Dictionary (1976) 52

Willard, John,
A Treatise on Equity Jurisprudence
(Platt Potter ed., 2d ed. 1875) 45

Wright, Charles A., *et al.*,
Federal Practice & Procedure
(3d ed. 2008) 22, 49

BRIEF FOR PETITIONERS

OPINIONS BELOW

The opinion of the court of appeals is reported at 673 F.3d 1071. JA289. An earlier opinion of the court of appeals was designated for publication, but was undesignated upon the issuance of the court of appeals' second opinion. JA186. The opinion of the district court is unpublished, and electronically reported at 2009 WL 4895362. JA119.

JURISDICTION

The court of appeals rendered its original decision on July 25, 2011. The court of appeals then denied petitioners' petition for panel rehearing and rehearing *en banc* and issued a substantially revised opinion on March 12, 2012. This Court granted a timely petition for certiorari on November 20, 2012. The Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL & STATUTORY PROVISIONS INVOLVED

The Fifth Amendment of the United States Constitution provides, in relevant part:

> [N]or shall private property be taken for public use, without just compensation.

U.S. CONST. amend. V.

The relevant provisions of the Tucker Act, 28 U.S.C. § 1491(a)(1); the Agricultural Marketing Agreement Act of 1937 ("AMAA"), as amended, 7 U.S.C. § 601 *et seq.*; and the *Marketing Order Regulating the Handling of Raisins Produced from Grapes*

Grown in California, 7 C.F.R. Part 989 ("Raisin Marketing Order" or "the Order"), are set forth in the Joint Appendix ("JA").

STATEMENT OF THE CASE

Petitioners Marvin and Laura Horne have grown Thompson seedless grapes for raisins in Fresno and Madera Counties for nearly half a century, and Don and Rena Durbahn (Laura's parents), recently deceased, a generation longer. Under a New Deal-era "marketing order" program, the United States Department of Agriculture ("USDA") requires "handlers" of raisins to set aside a certain portion of the raisins they obtain from producers and transfer ownership of these raisins to the government. The government uses these raisins for school lunches, export stimulation programs, and other governmental purposes. In the two years at issue in this case, the USDA required transfer of 47 percent of each producer's crop in 2002-2003 and 30 percent in 2003-2004. The USDA paid farmers like the Hornes nothing at all for their 2003-2004 raisins, and less than the cost of production for their 2002-2003 raisins.

The Hornes reorganized their business so that they did not use packers or distributors. They purchased and operated their own equipment for drying, seeding, stemming, and fumigating raisins, and sold their raisins directly to food processing companies and bakeries without using intermediaries. They believed (erroneously, according to a part of the decision below not challenged in the petition for certiorari) that if their raisins were not handled by packers and distributors, the USDA could not expropriate portions of their crop. Accordingly, the Hornes did not set aside a portion of their crop in those two years or

turn over any raisins to the government.

Determining that the Hornes themselves were "handlers" under the Raisin Marketing Order, the USDA filed an administrative action against the Hornes. The USDA rejected the Hornes' statutory claim that their raisins did not go through the hands of "handlers," as well as their constitutional claim that the taking of their raisins without just compensation violated the Fifth Amendment. Holding them responsible not just for their own raisins, but for raisins processed on their equipment from other family farms, the Department ordered the Hornes to pay the dollar value of the raisins they allegedly should have turned over ($483,843 over the two years), plus civil penalties in excess of $200,000 — exceeding the entire value of their raisin crop.

Following statutory procedures, the Hornes appealed this order through the USDA, then to the District Court for the Eastern District of California and the Court of Appeals for the Ninth Circuit. They lost on the merits at each stage, both on their statutory claim and on their constitutional takings and excessive fines claims. Only after the Hornes filed a petition for rehearing showing that the government's appropriation of their raisin crop conflicted with this Court's precedents under the Takings Clause, did the government — for the first time, in its opposition to the rehearing petition — argue that the courts below lacked jurisdiction to entertain the Hornes' takings claim. The panel withdrew its merits opinion and adopted the government's jurisdictional arguments — though it inexplicably "affirmed" the district court's decision in its entirety, in lieu of vacating the portion of that decision over which the court supposedly had no jurisdiction.

This Court granted certiorari to determine whether raisin farmers may raise the Takings Clause as a defense in district court to a USDA order requiring them to pay the government the monetary equivalent of a portion of their crop and an accompanying civil penalty, or whether they must litigate all non-takings defenses in one action, pay the disputed sums to the government, and then travel to the Court of Federal Claims to recover their money.

A. Statutory and regulatory framework.

1. Under the AMAA, the USDA heavily regulates segments of California's agricultural economy, which produces approximately 99 percent of the United States' and 40 percent of the world's raisins. JA295 n.9. Pursuant to the Act, the USDA has promulgated "marketing orders" for raisins, as well as several other agricultural products, such as walnuts, almonds, prunes, tart cherries, and spearmint oil. See *Evans v. United States*, 74 Fed. Cl. 554, 558 (2006). In general, these orders establish food product "reserve" programs under which farmers must set aside a specified portion of their agricultural crop "for the account of" the federal government. *Id.* at 557.

The order regulating raisins was promulgated in 1949. While similar in some respects to orders regulating other agricultural segments, the Raisin Marketing Order is different in two primary ways: "it effects a direct transfer of title of a producer's 'reserve tonnage' raisins to the government, and it requires physical segregation of the reserve-tonnage raisins held for the government's account." *Id.* at 558; see also 7 C.F.R. §§ 989.54, 989.55, 989.65, 989.66. Unlike other marketing orders, which are periodically put to a vote of producers and terminated if they do

not command a specified majority or super-majority, see 7 U.S.C. § 608c(19), the Raisin Marketing Order has never been put to a revote of raisin producers since its first adoption.

The Order separately defines "handlers" and "producers" of raisins. A "handler" is:

> (a) [a]ny processor or packer; (b) any person who places, ships, or continues natural condition raisins in the current of commerce from within [California] to any point outside thereof; (c) any person who delivers off-grade raisins, other failing raisins or raisin residual material to other than a packer or other than into any eligible non-normal outlet; or (d) any person who blends raisins [subject to certain exceptions].

7 C.F.R. § 989.15. A "producer" is "any person engaged in a proprietary capacity in the production of grapes which are sun-dried or dehydrated by artificial means until they become raisins." § 989.11.

Under the Order, the Raisin Administrative Committee ("RAC"), an agent of the USDA, establishes yearly raisin tonnage requirements, known as "reserve tonnage" and "free tonnage" percentages. 7 C.F.R. §§ 989.66, 989.166. The percentages are established by (and unknown until) February 15 of each crop year, long after farmers have expended substantial resources for the cultivation and harvest of their crop for the year. §§ 989.21, 989.54(d). Once the percentages are fixed, "handlers" of raisins must set aside the "reserve tonnage" requirement "for the account" of the RAC. §§ 989.65, 989.66(a), (b)(1). The RAC may require the delivery of the reserve-tonnage

raisins to anyone chosen by the RAC to receive them, § 989.66(b)(4), may sell reserve-tonnage raisins to handlers for resale in export markets, §§ 989.67(c)-(e), or may direct that the raisins be sold or disposed of by direct sale or gift to United States agencies, foreign governments, or charitable organizations, §§ 989.67(b)(2)-(4).

In the two years relevant to this case, 2002-2003 and 2003-2004, the USDA required farmers to turn over 47 percent and 30 percent of their raisin crops respectively. See RAC, *Marketing Policy and Industry Statistics, 2010*, at 27, *available at* http://www.raisins.org/files/Marketing%20Policy%202010.pdf (last visited Jan. 9, 2013). Through the reserve-tonnage set-aside, the government obtained, respectively, 22.1 million and 38.5 million pounds of raisins in those two years. See *id.* at 20. In 2002-2003, the farmers who produced those raisins were paid well below the cost of production (and considerably less than fair market value). See RAC, *Analysis Report* (Aug. 1, 2006), at 22, available at http://www.raisins.org/analysis_report/analysis_report.pdf (last visited Jan 9, 2013). In 2003-2004, the government paid nothing at all for the 38.5 million pounds of raisins that it took and used. See *id.* at 23; see also *id.* at 55.

The requirement to set aside "reserve tonnage" raisins and to turn them over to the government pertains to "handlers" as defined by the AMAA and accompanying regulations. The USDA takes the position that raisin farmers who sell their raisins directly instead of using a packer or distributor are "handlers" of their own raisins, and the set-aside applies to them in that capacity. JA74-75.

2. The AMAA provides that any "handler" who violates a marketing order may be subject to fines and penalties in a final USDA order. The AMAA further creates administrative and judicial review procedures that "handlers" of raisins must follow to appeal a USDA order. First, the handler must exhaust administrative remedies within the USDA, including constitutional as well as other challenges. See *United States* v. *Ruzicka*, 329 U.S. 287, 294 (1946). USDA orders are "reviewable in the district courts of the United States in any district in which the handler subject to the order is an inhabitant." 7 U.S.C. § 608c(14)(B). A "handler" may also bring a preenforcement petition with the Secretary of Agriculture arguing that a marketing order "is not in accordance with law." § 608c(15)(A). The "District Courts of the United States in any district in which such handler is an inhabitant, or has his principal place of business, are [] vested with jurisdiction in equity to review such ruling." § 608c(15)(B).

The USDA has promulgated "Rules of Practice Governing Procedures on Petitions to Modify or to Be Exempted from Marketing Orders," under which "[t]he term handler means any person who, by the terms of a marketing order, is subject thereto, or to whom a marketing order is sought to be made applicable." 7 C.F.R. § 900.51(i). As a result, all persons subject to marketing orders must bring any defenses they may have to USDA orders in District Court.

3. Enacted in 1887, the Tucker Act allows certain claims against the United States to proceed "for the breach of monetary obligations not otherwise judicially enforceable." *United States* v. *Bormes*, 133 S. Ct. 12, 17-18 (2012). Such claims typically must be brought in the Court of Federal Claims, which has

jurisdiction over claims "founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort." 28 U.S.C. § 1491(a)(1). Where it applies, the Tucker Act is a waiver of federal sovereign immunity. See *United States* v. *Mitchell*, 463 U.S. 206, 215-216 (1983); *Bormes*, 133 S. Ct. at 17-18.

The Tucker Act generally does not authorize declaratory or equitable relief. See, *e.g.*, *Bowen* v. *Massachusetts*, 487 U.S. 879, 905 & n.10 (1988) ("The Claims Court does not have the general equitable powers of a district court to grant prospective relief."). Instead, the primary function of the Tucker Act is to provide an avenue for an injured party to receive monetary redress from the United States. See, *e.g.*, *United States* v. *Testan*, 424 U.S. 392, 398 (1976) (explaining that Tucker Act jurisdiction is "limited to actual, presently due money damages from the United States"). The Court of Federal Claims is the gatekeeper for payments from Congress's indefinite appropriation to the judgment fund. See, *e.g.*, *OPM* v. *Richmond*, 496 U.S. 414, 431 (1990); *Bormes*, 133 S. Ct. at 16 n.2.

B. Proceedings below.

1. The Hornes and the Durbahns (hereinafter "the Hornes" or "petitioners") are independent farmers in Fresno and Madera Counties in California. Since 1969, the family has produced Thompson seedless grapes on a family farm called Raisin Valley Farms.

Like many raisin farmers, the Hornes became increasingly frustrated with the workings of the Raisin

Marketing Order, which they regard as "stealing [their] crop." JA123. As they explained in a letter to the Secretary of Agriculture, "[t]he Marketing Order Regulating Raisins has become a tool for grower bankruptcy, poverty, and involuntary servitude." JA124. After consulting with attorneys, university professors, and officials, the Hornes devised a new business model that they believed would comply with the law, without having to set aside reserve raisins for the RAC. By marketing their raisins directly to food processing companies and bakeries without using packers or distributors, through their own entity "Raisin Valley Marketing Association," they thought they would be deemed "producers" and not "handlers" under the Raisin Marketing Order and the AMAA. The Hornes therefore did not set aside the reserve-tonnage requirement for 2002-2003 and 2003-2004, the two years relevant to this case. JA298.

2. On April 1, 2004, the Administrator of the Agricultural Marketing Service initiated an enforcement action within the USDA, claiming that petitioners violated the AMAA. JA298. According to the Administrator, because all producers who sell any portion of their crop are effectively "handlers" subject to the Order, the Hornes became handlers by marketing their own raisins.

A USDA Administrative Law Judge ("ALJ") agreed. JA24. The ALJ reasoned that the requirement that petitioners hand over their raisins to the USDA without compensation "cannot be used as grounds for a taking claim since handlers no longer have a property right that permits them to market their crop free of regulatory control." JA39.

On appeal, a USDA Judicial Officer ("JO") af-

firmed. JA50. As to petitioners' takings claim, the JO claimed that he had "no authority to judge the constitutionality of the various statutes administered by the United States Department of Agriculture." JA73; but see *Ruzicka*, 329 U.S. at 294 (challenges under the AMAA "formulated in constitutional terms * * * in the first instance must be sought from the Secretary of Agriculture").

Of relevance here, the JO determined that, as "handlers," petitioners violated 7 C.F.R. § 989.66 and § 989.166 by failing to hold reserve raisins for the 2002-2003 and 2003-2004 crop years. JA91-92. The JO ordered petitioners to pay $438,843.53, the dollar equivalent of the withheld raisins for the 2002-2003 (632,427 pounds) and 2003-2004 (611,159 pounds) crop years, as determined by the "field price" typically paid to producers for free-tonnage raisins in those years (hereafter, the "monetary equivalent" component of the fine). 7 C.F.R. § 989.54(b). JA117. The JO also ordered petitioners to pay an additional $202,600 in civil penalties pursuant to 7 U.S.C. § 608c(14)(B), $177,600 of which was imposed for failure to comply with the reserve requirement (hereafter, the "penalty" component of the fine). JA108. Finally, the JO imposed an additional $8,783.39 in unpaid assessments pursuant to 7 C.F.R. § 989.80(a), which are not at issue here. It was only in their capacity as "handlers" that the Hornes were subject to the Order (and hence these fines and penalties).

3. Petitioners sought review of the agency decision in the United States District Court for the Eastern District of California under section 608c(14)(B). They contended that the requirement that they contribute a portion of their raisin crop to the government is an unconstitutional taking. They also argued

that (1) they are producers, not handlers, and thus are not subject to the Raisin Marketing Order; and (2) the penalties imposed upon them violate the Eighth Amendment's Excessive Fines Clause. The District Court granted summary judgment for the USDA. JA119.

Petitioners appealed. On July 25, 2011, a panel of the Ninth Circuit affirmed the judgment in its entirety. The panel held that petitioners are "'handlers' subject to the Raisin Marketing Order's provisions." JA186. With respect to petitioners' takings claim, the panel acknowledged that the Hornes' argument that the government owed just compensation for the raisins "has some understandable appeal." JA202. The panel recognized that the "raisins are personal property, personal property is protected by the Fifth Amendment, and each year the RAC 'takes' some of their raisins, at least in the colloquial sense." *Id.* And the panel conceded that "the government could [not] come onto the Hornes' farm uninvited and walk off with forty-seven percent of their crops without offering just compensation." JA202-203. Yet the panel held that no taking occurs under the regulatory scheme — and no compensation is required — when "the Raisin Marketing Order applies to the Hornes only insofar as they voluntarily choose to send their raisins into the stream of interstate commerce." JA203.

After petitioners filed a rehearing petition pointing out that the government's expropriation of a portion of their produce in return for permission to sell the rest flatly violated this Court's cases under the Fifth Amendment, see *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426, 428-429 (1982), the government argued — for the first time —

that the court lacked jurisdiction over the takings defense, because that issue must be brought in the Court of Federal Claims under the Tucker Act. The government conceded that "this jurisdictional issue was not presented to the panel," but represented that it went to the court's subject-matter jurisdiction and hence "may be raised at any point in the litigation." JA242 (quotations omitted). The government argued that petitioners were required to litigate their other defenses through statutory channels and, if they lost, pay the fine, and then sue to get their money back from the Court of Federal Claims.

After petitioners pointed out in a reply brief that the AMAA requires all handlers to challenge orders issued under that Act in district court and thus withdraws Tucker Act jurisdiction, the government modified its position yet again. This time, it argued that ordinary AMAA procedures did not apply because petitioners brought their takings defense in their capacity as "producers" and not as "handlers" — notwithstanding that the government had successfully argued throughout this litigation that petitioners were "handlers" (and, indeed, that it was only in their capacity as "handlers" that the reserve requirement even applied to petitioners). JA276-281.

Without allowing petitioners to file a brief in response to this novel theory, JA285, the panel issued a substantially revised opinion on March 12, 2012, JA289. The panel's new opinion retained its initial holdings that petitioners satisfied the definition of "handlers" under the Raisin Marketing Order and that petitioners did not have a valid defense under the Excessive Fines Clause. JA301-302, 306-310.

The panel replaced the entirety of its disposition

of petitioners' takings defense on the merits with a jurisdictional disposition. JA289. Relying solely on a Ninth Circuit precedent expressly repudiated by the plurality in *Eastern Enterprises* v. *Apfel*, 524 U.S. 498 (1998) — *Bay View, Inc.* v. *AHTNA, Inc.*, 105 F.3d 1281 (9th Cir. 1997) — the panel held that petitioners' request for an injunction was "unripe"; that the panel lacked jurisdiction to consider the takings claim; and that petitioners must pay the monetary fines imposed by the USDA and then bring that claim as a freestanding claim for compensation in a subsequent Tucker Act action in the Court of Federal Claims. JA306 ("*Bay View* makes clear that we lack jurisdiction to address the merits of [petitioners'] takings claim where Congress has provided a means for compensation.") (citing 105 F.3d at 1281, in turn citing *Williamson Cnty. Reg'l Planning Comm'n* v. *Hamilton Bank*, 473 U.S. 172, 194 (1985), which held that an inverse condemnation action challenging an alleged regulatory taking of real property by a municipal entity is not "ripe" until the property owner seeks and is denied compensation in a state forum). The panel neither acknowledged nor explained its reliance on a precedent repudiated by a plurality of this Court. See *Apfel*, 524 U.S. at 520-521 (disapproving of *Bay View*). The panel also held that petitioners were "producer-handlers" who, under the AMAA, must bring their takings claim "in their capacity as producers" in the Court of Federal Claims, while bringing all their other claims in district court as "handlers," in accordance with the statutory procedures. JA305.

Notwithstanding the jurisdictional disposition of petitioners' takings claim, the panel still provided that "[t]he summary judgment of the district court is

AFFIRMED," JA311 — rather than vacated and remanded with instructions to dismiss petitioners' takings claim for lack of jurisdiction. On the same day, the panel denied the rehearing petition and stated that the court would not entertain any additional petitions for rehearing, JA287, thereby denying petitioners recourse to the *en banc* court for review of the panel's jurisdictional holding.

SUMMARY OF ARGUMENT

I. The panel erred in holding that it lacked jurisdiction to consider petitioners' defense under the Takings Clause. That claim is immediately ripe for two independent reasons.

A. First, under *Apfel*, a party may challenge a governmental demand for a cash transfer without going through the repetitive steps of paying a fine and then going to the Court of Federal Claims to get the same sum back in the form of compensation for the taking.

Second, ripeness bars a lawsuit only in cases where the party seeks anticipatory relief against government action that has not yet taken place. It does not apply when a party seeks to interpose a constitutional defense to an enforcement action brought by the government at the time and in the forum of the government's own choosing.

B. Recent cases applying a specialized "ripeness" doctrine to takings claims confuse ripeness with equitable principles regarding the propriety of issuing an injunction. A review of the text, structure, and historical interpretation of the Takings Clause confirms that a party can obtain affirmative injunctive relief under the Clause or raise the Clause as a defense. The historical record shows that, from the earliest cases, a party could raise the Takings Clause

as a defense to government enforcement action. During the Nineteenth Century, courts (including this Court) held that affirmative injunctive relief was also available under the Clause where a party lacked a "reasonable, certain, and adequate" monetary remedy. This rule paralleled the standard for obtaining affirmative injunctive relief under *Ex parte Young*, 209 U.S. 123 (1908). The availability of affirmative injunctive relief did not limit the ability of parties to raise the Takings Clause as a defense. Nor was this rule ever characterized as an aspect of "ripeness" or "subject-matter jurisdiction" doctrine. It was viewed as the standard for obtaining injunctive relief under the Clause — what would now be described as "choice of remedies." Once the background legal rule is properly viewed (as an equitable principle regarding the availability of affirmative injunctive relief), it becomes clear that the panel's decision that it lacked jurisdiction because petitioners' takings claim is "unripe" was erroneous.

II. The review procedures of the AMAA withdraw the Tucker Act. The panel's holding that those procedures were inapplicable because petitioners challenged the USDA order in their "capacity as producers" rather than "handlers" misunderstands the statutory scheme and contradicts the litigating posture of the government in this very case.

The decision below should be reversed and the case remanded for consideration of petitioners' takings defense on the merits.

ARGUMENT

I. The federal courts have jurisdiction to address petitioners' defense under the Takings Clause to a "direct transfer of funds mandated by the Government."

The panel's holding incorrectly applied the doctrine of remedies for Takings Clause violations in two independent ways. First, as the plurality concluded in *Apfel*, ripeness does not bar district court adjudication of cases involving a direct transfer of funds to the government because Congress never intended to require property owners to jump pointlessly through two hoops. See 524 U.S. at 521. Second, ripeness does not prevent a party from raising a defense against a governmental enforcement action. Ripeness bars premature injunctive suits against government action when contingencies exist that might prevent that action from ever taking place. When the government itself brings the action at a time and in a forum of its own choosing, and the relief it seeks assertedly violates the private party's constitutional rights, the private party may bring any and all available constitutional defenses against the government's action. See *Missouri Pac. Ry.* v. *Nebraska*, 217 U.S. 196, 205-208 (1910).

More broadly, this case gives the Court the opportunity to clarify a confusion that has crept into the law of jurisdiction over takings claims. Recent cases have erroneously applied the label of "ripeness" to preexisting caselaw regarding equitable principles governing when an injunction would issue. Such mislabeling conflicts with centuries of precedent and disserves the purposes of the Takings Clause. A review of the historical practice shows that a property own-

er's ability to invoke the Takings Clause in opposition to government action is not a matter of jurisdiction, but of equitable principles. See *Cherokee Nation* v. *S. Kansas Ry.*, 135 U.S. 641, 659 (1890) (party may obtain injunction under Takings Clause when it lacks a "reasonable, certain, and adequate" money damages remedy). A proper understanding of those principles shows why both problematical aspects of the decision below — application of "ripeness" to a direct cash transfer and application of "ripeness" to defenses brought against government-initiated actions — violate deep and long-held principles of equity. Clarification of these points would not require this Court to overrule any of its holdings, but would reduce the confusion now prevailing among lower courts.

A. Petitioners' takings claim is ripe.

1. An injunctive claim against a "direct transfer of funds mandated by the government" is immediately ripe.

In *Apfel*, a four-Justice plurality concluded that parties may obtain injunctive relief to enjoin the "direct transfer of funds mandated by the Government" in violation of the Takings Clause. 524 U.S. at 521 (quotation marks and citation omitted). A fifth Justice would have decided the case under the Due Process Clause, and thus did not reach the Takings Clause ripeness issue. *Id.* at 547 (Kennedy, J., concurring). The dissenters did not contest the plurality's analysis of jurisdiction. *Id.* at 550-551 (Stevens, J., dissenting); *id.* at 556 (Breyer, J., dissenting).

Although technically only a plurality opinion, *Apfel*'s jurisdictional rule has been applied to takings challenges to direct cash transfers by every court of appeals to have considered the issue other than the

one below. See *Asociación de Subscripción Conjunta del Seguro de Responsabilidad Obligatorio* v. *Flores Galarza*, 484 F.3d 1, 19-20 (1st Cir. 2007); *Wash. Legal Found.* v. *Tex. Equal Access to Justice Found.*, 270 F.3d 180, 192-193 (5th Cir. 2001), *vacated on other grounds sub nom. Phillips* v. *Wash. Legal Found.*, 538 U.S. 942 (2003); *Washlefske* v. *Winston*, 234 F.3d 179 (4th Cir. 2000); *Student Loan Mktg. Ass'n* v. *Riley*, 104 F.3d 397, 401-402 (D.C. Cir. 1997); *In re Chateaugay Corp.*, 53 F.3d 478, 493 (2d Cir. 1995). In addition, following *Apfel*, this Court twice addressed the merits of takings claims to direct money transfers without questioning jurisdiction. See *Brown* v. *Legal Found. of Wash.*, 538 U.S. 216 (2003); *Phillips* v. *Wash. Legal Found.*, 524 U.S. 156 (1998).

1. As this Court has recognized, it would be unreasonable to require a property owner "to resort to piecemeal litigation or otherwise unfair procedures" to pursue a takings claim. *MacDonald, Sommer, & Frates* v. *Yolo Cnty.*, 477 U.S. 340, 350 n.7 (1986); see also *Palazzolo* v. *Rhode Island*, 533 U.S. 606, 626 (2001). A takings claim may be brought immediately where further procedural steps would be "repetitive and unfair." *City of Monterey* v. *Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 698 (1999). Applying these principles, the plurality in *Apfel* determined that a party may obtain equitable relief, prior to the initiation of a Tucker Act lawsuit, to enjoin a "direct transfer of funds mandated by the Government." 524 U.S. at 521 (quotation marks and citation omitted).

In *Apfel*, a company ("Eastern") no longer involved in the coal industry challenged the constitutionality of a statute requiring it to pay money into a fund for health-care benefits for coal-industry retirees. The plurality ultimately concluded that the Act violated

the Takings Clause and that the challenged provisions should be enjoined as applied to Eastern. The opinion first addressed the Court's "jurisdiction," because Eastern raised the Takings Clause seeking "a declaratory judgment that the [statute] violates the Constitution and a corresponding injunction against the * * * enforcement of the Act as to Eastern." 524 U.S. at 520. The plurality determined that the injunctive takings claim was "ripe." It noted that this Court had many times addressed takings claims on the merits in a comparable posture. See *Babbitt* v. *Youpee*, 519 U.S. 234 (1997); *Suitum* v. *Tahoe Reg'l Planning Agency*, 520 U.S. 725 (1997); *Connolly* v. *Pension Benefit Guar. Corp.*, 475 U.S. 211 (1986); *Concrete Pipe & Prods. of Cal., Inc.* v. *Constr. Laborers Pension Trust for S. Cal.*, 508 U.S. 602 (1993); *Hodel* v. *Irving*, 481 U.S. 704 (1987); see also *Webb's Fabulous Pharmacies* v. *Beckwith*, 449 U.S. 155 (1980) (same).

The *Apfel* plurality reasoned that requiring a party to pay the monetary amount and then bring a later claim for money damages in the Court of Federal Claims would mean that "'[e]very dollar paid pursuant to a statute would be presumed to generate a dollar of Tucker Act compensation,'" something that "Congress could not have contemplated." 524 U.S. at 521 (citation omitted). Because "a claim for compensation would entail an utterly pointless set of activities," a federal court could issue a "declaratory judgment and injunction" under the Takings Clause. *Id.* at 521-522 (quotation marks and citation omitted). "Accordingly, the presumption of Tucker Act availability must be reversed where the challenged statute, rather than burdening real or physical property, requires a direct transfer of funds mandated by the

Government." *Id.* (quotation marks and citation omitted).

2. Under the *Apfel* plurality's reasoning, petitioners' takings claim is ripe and they may enjoin the imposition of both the "monetary equivalent" component and the "penalty" component of the fine. As in *Apfel*, petitioners "do[] not seek compensation from the Government." 524 U.S. at 520. They oppose an unconstitutional exaction. Unlike an inverse condemnation case or other suit for compensation, a district court judgment in petitioners' favor would not require the government to pay a dime from the judgment fund. Like *Apfel*, this case does not implicate the Court of Federal Claims' function as the gatekeeper for claims against the public fisc. Injunctive relief is available where a party "does not seek compensation from the Government," but rather "requests a declaratory judgment that * * * the [statute] violates the Constitution and a corresponding injunction against * * * enforcement of the Act." *Ibid.*

Petitioners challenge the RAC's order that they pay "$483,843.53 for the dollar equivalent of the California raisins they failed to hold in reserve for crop years 2002-2003 and 2003-2004." JA117. That "dollar equivalent" is calculated by determining the fair-market value of petitioners' raisins, *see* 7 C.F.R. § 989.166(c) (calculation is to be conducted by "multiplying the quantity of reserve raisins not delivered by the latest weighted average price per ton"), which not coincidentally is effectively the measure of the compensation that would be due petitioners were they to litigate successfully a claim for compensation in the Court of Federal Claims. Any successful compensation claim in the Court of Federal Claims would simply require a dollar-for-dollar return of the mon-

ey.

Similar logic applies to the civil penalty. Just as a fine for violating an unconstitutionally speech-restrictive ordinance may be challenged as a free speech violation, *McIntyre* v. *Ohio Elections Comm'n*, 514 U.S. 334, 357 (1995), so also a fine for refusing to comply with a regulation that would violate the Takings Clause may be challenged as a Fifth Amendment violation. See *Missouri Pac. Ry.*, 217 U.S. at 205-208; *Wilkie* v. *Robbins*, 551 U.S. 537, 583 (2007) (Ginsburg, J., dissenting) ("Correlative to the right to be compensated for a taking is the right to refuse to submit to a taking where no compensation is in the offing."). The latter is no less "ripe" than the former.

While the *reason* the cash payment demand violates the Takings Clause in this case (the demand for payment is being used to enforce a regulation that violates the Takings Clause) differs somewhat from the *reason* the cash payment demand violated the Takings Clause in *Apfel* (the demand for payment itself violated the Takings Clause), that has no bearing on the jurisdictional analysis. In both instances, payment of cash and a subsequent lawsuit would entail an "utterly pointless" Tucker Act proceeding in the Court of Federal Claims. Rather than litigating all of one's federal statutory and constitutional claims in a single case, the panel's rule would require a party to exhaust first his statutory and administrative challenges in federal court, then pay the fine before bringing another, separate action in the Court of Federal Claims to recover the exact same amount of money as the fine. That makes as little sense here as it did in *Apfel*.

This Court should reaffirm the authority of *Apfel*

and hold that takings challenges to "direct transfers of funds mandated by the government," including fines, are ripe when those mandates are enforced, without need for a duplicative trip to the Court of Federal Claims.

2. A defense to government-initiated enforcement action is immediately ripe.

1. The ripeness doctrine bars premature declaratory or injunctive suits in disputes that involve "uncertain or contingent future events that may not occur as anticipated, or indeed may not occur at all." 13B Charles A. Wright *et al.*, *Federal Practice & Procedure* § 3532 (3d ed. 2008); see *Younger* v. *Harris*, 401 U.S. 37, 41-42 (1971) (holding contingent threat of prosecution under state law inadequate to create ripe controversy). Compare *Reg'l Rail Reorganization Act Cases*, 419 U.S. 102, 143 (1974) (concluding that a takings claim was ripe, even though alleged taking had not yet occurred, because it was "in no way hypothetical or speculative"). When the government itself brings the action at a time and in a forum of its choosing, however, and the relief it seeks assertedly violates the private party's constitutional rights, the private party is entitled to bring any and all constitutional defenses against the government's action. See *Younger*, 401 U.S. at 49 (refusing to enjoin pending proceeding based on asserted facial unconstitutionality of statute because a proceeding brought by the State "afford[ed] [defendant] an opportunity to raise his constitutional claims"); *Steffel* v. *Thompson*, 415 U.S. 452, 482-483 (1974) (Rehnquist, J., concurring) (where government initiates prosecution, "the defendant at that point is able to present his case for full consideration by a state court charged, as are the federal courts, to preserve the defendant's constitutional

rights"). Thus it is well-settled that defendants in government-initiated proceedings may raise constitutional rights in their defense, see *Wisconsin* v. *Yoder*, 406 U.S. 205 (1972) (holding that defendant may raise First Amendment defense to government proceeding for fine), including under the Takings Clause, see *Missouri Pac. Ry.*, 217 U.S. at 205-208 (permitting property owner to bring Takings Clause defense to fine imposed for violating an unconstitutional requirement).

2. To apply "ripeness" to *defenses* turns the concept upside down. There has never been doubt that a person facing a governmental action — a criminal prosecution, a civil enforcement action, a suit for penalties or injunction — is permitted to raise any available legal defenses. There is no "ripeness" issue because the government's action itself, if successful, will produce the injury. There are no contingencies other than the outcome of the litigation. And there can be no judicial efficiencies from postponement of a matter that is already underway. "Ripeness properly should be understood as involving the question of *when a party may seek preenforcement review of a statute or regulation*," because "[c]ustomarily, a person can challenge the legality of a statute or regulation only when he or she is prosecuted for violating it." Erwin Chemerinsky, *Federal Jurisdiction* § 2.4, at 118 (5th ed. 2007). In the context of administrative actions, "ripeness" applies to preenforcement actions or adjudications. See *Abbott Labs.* v. *Gardner*, 387 U.S. 136, 148 (1967) (ripeness limits "injunctive and declaratory judgment remedies" because they "are discretionary, and courts traditionally have been reluctant to apply them to administrative determinations unless these arise in the context of a controver-

sy 'ripe' for judicial resolution"), *overruled on other grounds*, *Califano* v. *Sanders*, 430 U.S. 99 (1977); Stephen G. Breyer *et al.*, *Administrative Law and Regulatory Policy* 942 (7th ed. 2011) ("Before *Abbott Laboratories*, the courts typically reviewed the lawfulness of an agency's rule, not when the agency promulgated the rule, but when the agency enforced the rule."); Richard J. Pierce, Jr. *et al.*, *Administrative Law and Process* § 5.7, at 213 (5th ed. 2009) (same).

Ripeness is a shield to protect against premature litigation; it is not a sword to enable the government to violate the Constitution without having to respond to constitutional defenses. If the government elected to prosecute criminally under the AMAA — as it may, see 7 U.S.C. § 608c(14)(A) — no one would doubt the defendant could assert the unconstitutionality of the underlying order as a defense. There is no logical reason why a civil penalty makes the defense any less "ripe."

3. In accord with these general principles, this Court has heard Takings Clause defenses to government-initiated actions on the merits on numerous occasions, without ever suggesting that ripeness was a conceivable bar. See, *e.g.*, *Kaiser Aetna* v. *United States*, 444 U.S. 164 (1979) (addressing takings claim raised as defense to United States' effort to obtain navigational servitude); *Miller* v. *Schoene*, 276 U.S. 272 (1928) (considering and rejecting on the merits a takings defense to an order to fell cedar trees); *Missouri Pac. Ry.*, 217 U.S. at 208 (reversing fine imposed on railroad for failure to comply with regulatory requirement held to violate the Takings Clause); *Union Bridge Co.* v. *United States*, 204 U.S. 364 (1907) (rejecting merits of takings defense to criminal

prosecution for failure to remove obstruction from navigable waterway); *Chicago, Burlington, & Quincy Ry.* v. *Illinois*, 200 U.S. 561, 565 (1906) (adjudicating takings defense raised in mandamus action brought by municipality to compel construction activity by railroad); see also *Pruneyard Shopping Ctr.* v. *Robins*, 447 U.S. 74 (1980) (considering and rejecting merits of takings defense raised to action to enjoin shopping center to permit access to its property); *St. Louis & S.F. Ry.* v. *Gill*, 156 U.S. 667 (1895) (rejecting on the merits a Takings Clause defense to a suit by a private plaintiff alleging that the railroad charged excessive rates).

The same is true, as here, where the government conducts agency enforcement proceedings in an adjudicatory context. In *FCC* v. *Florida Power Corp.*, 480 U.S. 245 (1987), the Court considered a takings defense in such a posture. A power company accused of excessive charges in agency adjudications invoked the Takings Clause as a defense. See *id.* at 248-249. The agency rejected the defense, and the company appealed that adverse agency adjudication through the federal courts — including this Court. Although this Court ultimately rejected the defense on the merits, it nowhere suggested that the defense was unripe.

These cases are persuasive evidence that the courts below had jurisdiction to consider petitioners' defense. See *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 307 (1962) ("While we are not bound by previous exercises of jurisdiction in cases in which our power to act was not questioned but was passed *sub silentio*, neither should we disregard the implications of an exercise of judicial authority assumed to be proper [in previous cases].") (citation omitted); see

also *Apfel*, 524 U.S. at 522 (same).

4. No holding of this Court calls into question the bedrock principle that when the government files an action seeking relief that would assertedly violate a private party's constitutional rights, that party is entitled to assert its rights as a defense. Although this Court suggested in *dictum* in *United States* v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985), that an enforcement "lawsuit is not the proper forum for resolving" a takings dispute, the party in that case raised only a statutory claim, not a constitutional defense to an enforcement action. *Id.* at 129 n.6. In a footnote, the Court noted that subsequent to the events giving rise to the case, the property owner had been denied a permit, thus possibly making a takings claim "ripe." *Id.* In reference to that claim, which had not been brought, the Court stated that, although the record gave the Court "no basis for evaluating the claim," if the government "has indeed effectively taken [ ] property, [the] proper course is not to resist the [government's] suit for enforcement by denying that the regulation covers the property, but to initiate a suit for compensation in the Claims Court." *Ibid.* For the reasons given above, petitioners respectfully submit that this *dictum* is contrary to the great weight of caselaw, and is not persuasive.

5. Confining ripeness to preenforcement actions brought by private parties also makes sense as a practical matter. Duplicating proceedings under these circumstances would not only be costly — no insignificant consideration for small farmers like the Hornes, cf. *Sackett* v. *EPA*, 132 S. Ct. 1367 (2012) — but adjudicating the takings claim in the single action would, if the court finds a taking, allow the government to choose whether to pay the value or aban-

don its claim. By contrast, leaving adjudication for a monetary Tucker Act claim would mean that the government could not reverse course, but would be required to pay compensation, regardless of the intention of the legislature. The panel's approach thus both denies private parties an efficient adjudication of their takings claim and also requires the Treasury to pay compensation for government actions that Congress would not have authorized had they been known to take property. Here, for example, there is no reason to believe Congress had any intention to pay market value for reserve raisins. As this Court has said, "[t]o delay until any Court of Claims adjudication with respect to the form of consideration provided by the Act would be exceedingly irresponsible" because Congress may reconsider "whether to abandon the whole Act if it turned out that the entire value of the [ ] properties must be paid in cash." *Reg'l Rail Reorganization Act Cases*, 419 U.S. at 150 n.36.

No comparable judicial efficiencies would be fostered by requiring parties to litigate the takings issue in a separate case in the Court of Federal Claims. It makes little sense to bifurcate proceedings and require a property owner to bring an affirmative claim for monetary relief following the government's initiation of a dispute and selection of a forum.

B. The Court should clarify that the availability of equitable relief under the Takings Clause depends on traditional principles of equity rather than ripeness.

The flaws in the panel's decision — application of "ripeness" to a direct cash transfer and to defenses brought against government-initiated enforcement actions — stem from a common source: confusion

about the difference between jurisdiction and equitable remedies. The Court should take this opportunity to clarify the misunderstanding of law that has crept into the jurisprudence of the lower courts.

1. The historical understanding of the Constitution establishes that equitable principles govern the availability of equitable relief under the Takings Clause.

1. The rights invoked by Marvin and Laura Horne in this case are among the oldest and most fundamental in our system of liberties and limited government. Magna Charta itself provided that "[n]o constable or other royal official shall take corn or other movable goods from any man without immediate payment." Magna Charta, Cl. 28 (1215). A decade before the American Revolution, William Blackstone explained that government may take property "not by absolutely stripping the subject of his property in an arbitrary manner; but by giving him a full indemnification and equivalent for the injury thereby sustained." I *Commentaries on the Laws of England* 135 (1765). This principle was adopted by the framers of the Bill of Rights without debate or dissent.

The Takings Clause provides that private property shall not "be taken for public use, without just compensation." U.S. CONST. amend. V. On its face, it is not apparent that the Clause allows the government to take property on the promise to compensate a property owner for condemned property months, years, or even decades after it is taken. Similar language in the Due Process Clause of the Fifth Amendment — that property cannot be taken "without due process of law" — has been interpreted to

mean that, absent special circumstances, the Clause "requires some kind of a hearing *before* the State deprives a person of liberty or property." *Zinermon* v. *Burch*, 494 U.S. 113, 127 (1990) (citing cases). Given that Magna Charta called for "immediate payment" if a royal constable took a farmer's corn, it is hard to believe raisin farmers are entitled to any less in modern America.

For centuries, property owners have been able to challenge government action where just compensation was not otherwise forthcoming. In a leading case authored by Justice Blackstone, for example, a landowner sued government road commissioners for trespass on the case alleging that their actions in raising the gradient of a road had "obstructed the doors and windows" of several houses, rendering the properties nearly unusable and causing four tenants to leave. See *Leader* v. *Moxon*, 96 Eng. Rep. 546, 546 (C.P. 1773), *reported sub nom. Leader* v. *Moxton*, 95 Eng. Rep. 1156. The commissioners responded by invoking a law of Parliament authorizing them to raise the gradient of the road. See *id.* Blackstone disagreed that the law provided authorization: "[H]ad Parliament intended to demolish or render useless some houses for the benefit or ornament of the rest, it would have given express powers for that purpose, *and given an equivalent for the loss that individuals might have sustained thereby*." *Id.* at 547 (emphasis added). Accordingly, the commissioners' actions were *ultra vires* and they were required to respond in damages — even punitive damages.

2. The early historical record includes a wealth of cases in which property owners invoked the Takings Clause to disable government action. These cases typically arose as common law actions against public

officials for trespass, trespass on the case, or nuisance. A public official would then seek to interject a public law purportedly authorizing his actions as justification for those actions, at which point the private party would defend against reliance on that public law on the ground that it violated the Takings Clause. See Robert Brauneis, *The First Constitutional Tort: The Remedial Revolution in Nineteenth-Century State Just Compensation Law*, 52 VAND. L. REV. 57, 67-68 (1999). If the official action had already occurred and inflicted injury, the remedy was damages; if it had not yet occurred, the remedy was an injunction. Not one of these cases — federal or state — suggested that resort to the Takings Clause was unripe, that the court lacked jurisdiction, or that the property owner was compelled to submit to the government action and seek compensation for an accomplished taking. Instead, courts adjudicated the validity of government officials' claim of right vis-à-vis the Takings Clause in a single action, and restrained the government officials' action if the legislature had not provided compensation. The general rule was that compensation had to be paid before or "simultaneously" upon the taking; otherwise, the taking would be enjoined. *San Mateo Waterworks* v. *Sharpstein*, 50 Cal. 284, 285 (1875) ("The taking in this case amounts to a taking of private property for public use in the sense in which that phrase is used in the Constitution, and can only be effected upon the conditions prescribed in the Constitution — that is, upon just compensation being simultaneously made.").

In *Bonaparte* v. *Camden & A.R. Co.*, 3 F. Cas. 821 (C.C.N.J. 1830), for example, Justice Baldwin enjoined railroad officials acting under the auspices of a

New Jersey charter authorizing them to take land for railroad construction. *Id.* at 833-834 (ruling that officials had not complied with just compensation obligation embodied in statute or constitution). Invoking the Fifth Amendment, the court rejected the contention that statutory authorization exempted the officials from an injunction forbidding their imminent trespass: "If the law is unconstitutional, it can give no authority * * * [and] the person who acts by colour of law merely is a trespasser; and wherever the court have power to take cognizance of an action of trespass * * * a court of equity may * * * prevent its commission." *Id.* at 827; see also *Baring* v. *Erdman*, 2 F. Cas. 784 (C.C.E.D. Pa. 1834) (official acting pursuant to an unconstitutional statute may be "enjoin[ed] from any future acts, however deeply it might affect the interests of the state"); *Griffing* v. *Gibb*, 67 U.S. 519, 522 (1862), *rev'g*, 11 F. Cas. 33, 36 (C.C.N.D. Cal. 1857) (officials could not successfully demur to nuisance action based on statute where application of statute was alleged to result in unconstitutional taking).

Many state courts interpreted parallel state takings provisions. The pattern in these cases was the same. Property owners could invoke the state takings provision to counter government officials' invocation of statutory authority and to obtain damages or injunctive relief as appropriate. In one such case, the Massachusetts Supreme Judicial Court explained that an act that "confer[red] a power on [a] corporation to take private property for public use, without providing for * * * the payment of an adequate indemnity" would contravene the state constitution, resulting in a declaration that "the wrongful act would stand unjustified by legislative grant." *Thacher* v. *Dartmouth Bridge Co.*, 35 Mass. (18 Pick.) 501, 502

(1836); see also *Sinnickson* v. *Johnson*, 17 N.J.L. 129 (1839) (defendants liable in nuisance and trespass on the case for flooding because statute authorized construction of dam but provided no compensation); *Bloodgood* v. *Mohawk & Hudson R.R.*, 18 Wend. 9, 78 (N.Y. 1837) (trespass action prohibiting railway that claimed authorization from corporate charter to take property with damages to be paid later from entering land "until [plaintiff's] damages were appraised and paid"); *Perry* v. *Wilson*, 7 Mass. 393, 395 (1811) (holding defendant liable in trespass because law purportedly authorizing taking of logs failed to provide just compensation and was thus void).

Reviewing these and other cases, an early treatise declared that, "as an original question, it seems to us clear that the proper interpretation of the constitution requires that the owner should receive his just compensation before entry upon his property." John Lewis, *A Treatise on the Law of Eminent Domain in the United States* § 456 (1888).

3. Over the course of the Nineteenth Century, courts, including this Court, repeatedly allowed parties to bring affirmative injunctive claims under the Takings Clause. See *Yates* v. *City of Milwaukee*, 77 U.S. 497, 506 (1870) (enjoining municipality from removing dock and wharf alleged to impede navigation upon mere legislative declaration that facilities constituted nuisance and without compensation); see also *Smyth* v. *Ames*, 169 U.S. 466, 549-550 (1898) (enjoining enforcement of rate regulation as unconstitutional taking), *overruled on other grounds*, *Fed. Power Comm'n* v. *Hope Natural Gas Co.*, 320 U.S. 591, 605 (1944); *Tindal* v. *Wesley*, 167 U.S. 204, 222-223 (1897) (state officers subject to ejectment where state had not acquired property by paying just compensation);

D.M. Osborne & Co. v. *Missouri Pac. Ry.*, 147 U.S. 248, 258-259 (1893) (injunctive relief available "in view of the inadequacy of legal remedy"); *United States* v. *Lee*, 106 U.S. 196, 218 (1882) (affirming order ejecting federal officials from land acquired in improper tax sale); *Pumpelly* v. *Green Bay & Miss. Canal Co.*, 80 U.S. 166, 177 (1871) (construing Wisconsin constitutional provision "almost identical" to federal Takings Clause as invalidating statute authorizing dam that caused flooding of plaintiff's property where defendants denied obligation of compensation).

The availability of an affirmative injunctive action was limited by traditional doctrines. For example, the rise of railroads and large federal public works projects prompted Congress, in certain circumstances, to create specific procedures to determine compensation in conjunction with specific statutes authorizing condemnation of property. The question arose whether these specific procedures for obtaining compensation precluded entry of an injunction in an affirmative lawsuit. In the leading case, the Court determined that, "[w]hether a particular provision be sufficient to secure the compensation to which, under the constitution, [a property owner] is entitled, is sometimes a question of difficulty," and that a property owner was barred from obtaining an injunction only if the legislature had enacted a "reasonable, certain, and adequate provision for obtaining compensation before his occupancy is disturbed." *Cherokee Nation*, 135 U.S. at 659. Thus, the Court determined that the Constitution "does not provide or require that compensation shall be actually paid in advance of the occupancy of the land to be taken," if "reasonable, certain, and adequate provision" for obtaining such compensation had been created before occupan-

cy was disturbed. *Ibid.*

The rule of *Cherokee Nation* parallels this Court's decision in *Ex parte Young* that injunctive relief was available to enjoin state officials who violated the Constitution. There, too, the Court addressed whether there was "a plain and adequate remedy at law," 209 U.S. at 163, before issuing an injunction, see *id.* at 165; see also *Scott* v. *Donald*, 165 U.S. 107, 114 (1897) ("[T]he circuit courts of the United States will restrain a state officer from executing an unconstitutional statute of the state when to execute it would be to violate rights and privileges of the complainant that had been guarantied by the constitution, and would do irreparable damage and injury to him * * * .") (quoting *Ex parte Tyler*, 149 U.S. 164, 191 (1893)); IV John Norton Pomeroy, *A Treatise on Equity Jurisprudence as Administered in the United States of America* § 1363, at 3255-258 (4th ed. 1919).

Under the rule of *Cherokee Nation*, various specific compensation provisions were upheld as "reasonable, certain, and adequate," thereby precluding immediate entry of an injunction under the Takings Clause. See *Dohany* v. *Rogers*, 281 U.S. 362, 365 (1930) (upholding statute providing for direct condemnation proceedings under which highway commission would occupy property only after determination of compensation award, but during pendency of appeal regarding compensation award); *Joslin Mfg. Co.* v. *City of Providence*, 262 U.S. 668, 677-678 (1923) (upholding statute providing for taking subject to challenge to compensation award and one year delay in occupying property while challenge was resolved); *Bragg* v. *Weaver*, 251 U.S. 57, 62 (1919) (upholding statute providing for occupation of property for road construction before the compensation pro-

ceeding was completed); *Sweet* v. *Rechel*, 159 U.S. 380, 400-402 (1895) (owner of lands subject to flooding by dam need not be compensated in advance because statute provided compensation without "undue risk or unreasonable delay").

In contrast, several forms of monetary compensation schemes were deemed unreasonable, uncertain, or inadequate. See *United States* v. *Sioux Nation of Indians*, 448 U.S. 371 (1980) (awarding retrospective damages for taking because Congress previously provided constitutionally inadequate means to obtain compensation in conjunction with treaty); *Western Union Tel. Co.* v. *Pa. R.R.*, 195 U.S. 540, 570-571 (1904) (applying *Cherokee Nation* in the course of statutory construction to hold that a statute favoring telegraph company did not provide for eminent domain given the plainly inadequate remedies provided); *Macfarland* v. *Poulos*, 32 App. D.C. 558, 562-563 (D.C. Cir. 1909) (holding provision for compensation inadequate under *Cherokee Nation*); see also *Conn. River R.R.* v. *Franklin Cnty. Comm'rs*, 127 Mass. 50 (1879), cited in *Sweet*, 159 U.S. at 401 (explaining that *Connecticut River* held inadequate compensation for taking when it was to be paid "out of the earnings of" private railroad).

In short, while there may have been some disagreement over whether compensation was required "*before* entry upon * * * property," Lewis, *supra*, *Law of Eminent Domain* § 456 (emphasis added), it was well-settled that the Constitution required "reasonable, certain, and adequate provision for obtaining compensation before * * * occupancy is disturbed." *Cherokee Nation*, 135 U.S. at 659; see also Lewis, *supra*, *Law of Eminent Domain* § 456 (recognizing that, by 1888, "in most states * * * compensation need not

precede an entry upon the property, provided some definite provision is made whereby the owner will certainly obtain compensation"). Without such provision, an injunction issued.

No constitutional "ripeness" doctrine required property owners to exhaust remedies before challenging a taking. It was the obligation of the government defendant to show that the availability of "reasonable, certain, and adequate provision for obtaining compensation" precluded plaintiff's claim for an injunction. This was an ordinary application of equitable principles — what would now be regarded as "choice of remedies" — and not a question of subject-matter jurisdiction. See Douglas Laycock, *Modern American Remedies* 380-381 (4th ed. 2010).

4. Following the creation of the Court of Claims (later, the Court of Federal Claims), the question arose whether the damages remedy created by Congress in those courts precluded entry of an injunction. In general, the Court distinguished between cases in which the government recognized that its action constituted a taking and that just compensation was due, and those cases in which the obligation of compensation was contested. Cases in the former category belonged in the Court of Claims under the Tucker Act; cases in the latter category belonged in district court, with injunctive remedies available. See *Mitchell* v. *United States*, 267 U.S. 341, 345 (1925) ("There can be no recovery under the Tucker Act if the intention to take is lacking.") (citation omitted); *Tempel* v. *United States*, 248 U.S. 121, 130-131 (1918) (same). Compare *Hurley* v. *Kincaid*, 285 U.S. 95, 104 (1932) (holding that, because government recognized that it was taking property, plaintiff had "no basis for an injunction" because "compensation may be pro-

cured in an action at law"), with *Lee*, 106 U.S. at 218 (affirming order sought by General Robert E. Lee's heirs ejecting federal agents and providing for the return of Lee's Virginia estate); *Langford* v. *United States*, 101 U.S. 341 (1879) (affirming dismissal of takings claim by Court of Claims where the government denied there was a taking).

At first this distinction was linked to the distinction between contract and tort under the Tucker Act. See 28 U.S.C. § 1491(a)(1) (establishing Tucker Act jurisdiction over "cases not sounding in tort"). Where the legislature evinced an intention to pay compensation for the taking of property, the case was said to arise under contract and fall within the scope of the Tucker Act. See *United States* v. *Great Falls Mfg. Co.*, 112 U.S. 645, 656-657 (1884) ("The law will imply a promise to make the required compensation, where property, to which the government asserts no title, is taken, pursuant to an act of congress, as private property to be applied for public uses."); see also *Portsmouth Harbor Land & Hotel Co.* v. *United States*, 250 U.S. 1, 2 (1919); *Peabody* v. *United States*, 231 U.S. 530, 540 (1913); *Schillinger* v. *United States*, 155 U.S. 163, 168-169 (1894). Later, after the Court interpreted the Tucker Act to cover takings sounding in tort, see *United States* v. *Causby*, 328 U.S. 256, 267 (1946), the issue became one of practicality. When the action challenged as a taking was complete, as in *Causby*, the case proceeded to the Court of Claims, but when the taking had not yet occurred, duty to compensate was contested, and there was no indication of congressional intent to pay if the action were deemed to be a taking, the case proceeded in district court, enabling the government to choose between cancelling the action and paying compensation in the

event the action was deemed a taking. See *Reg'l Rail Reorganization Act Cases*, 419 U.S. at 149 n.36; see also *Duke Power Co.* v. *Carolina Envtl. Study Grp., Inc.*, 438 U.S. 59, 71 n.15 (1978). Where nothing suggested that the legislature intended to pay compensation, an injunction rather than a Tucker Act suit was the proper avenue for relief. *Reg'l Rail Reorganization Act Cases*, 419 U.S. at 143; *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 584-585 (1952) (entry of injunction proper because "[p]rior cases in this Court have cast doubt on the right to recover in the Court of Claims" and "seizure and governmental operation of these going businesses were bound to result in many present and future damages of such nature as to be difficult, if not incapable, of measurement"); cf. *Penn Cent. Transp. Co.* v. *City of New York*, 438 U.S. 104 (1978) (hearing, on the merits, appeal from order reversing injunction against enforcement of historic preservation law where legislature provided arguably inadequate in-kind compensation).

5. In the mid-1980s, opinions of the Court began to attach the label of "ripeness" to the idea that property owners with an adequate remedy at law could not obtain an injunction for a taking of their property, thus appearing to convert what had been a routine application of general principles of equity into a jurisdictional question. With all respect, this has been the source of great confusion and unfairness, of which the decision below is only one example.

As recently as 1974, the Court in the *Regional Rail Reorganization Act Cases* distinguished between choice of remedies and ripeness. The Court held that a takings claim seeking an injunction was ripe, because it was "in no way hypothetical or speculative."

419 U.S. at 143. Applying traditional principles of constitutional ripeness, the Court determined that "[w]here the inevitability of the operation of a statute against certain individuals is patent, it is irrelevant to the existence of a justiciable controversy that there will be a time delay before the disputed provisions will come into effect. One does not have to await the consummation of threatened injury to obtain preventive relief." *Id.* (quotation marks and citations omitted) . At the same time, the Court held on the facts there that "the availability of the Tucker Act guarantees an adequate remedy at law for any taking which might occur" at some point in the future. *Id.* at 149; see also *id.* at 136.

In *Ruckelshaus* v. *Monsanto Co.*, 467 U.S. 986 (1984), the Court considered whether the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA") violated the Takings Clause by appropriating certain trade secrets. The case had been brought in district court, and that court had issued an injunction against enforcement of certain aspects of the statute it deemed to be an uncompensated taking. *Id.* at 1000. In contrast to the panel's approach in the present case, this Court did not simply redirect the plaintiff to the Court of Federal Claims. On the contrary, this Court engaged in lengthy legal analysis of the merits of the Fifth Amendment issue, holding that some aspects of FIFRA would effectuate takings requiring just compensation. See *id.* at 1000-17. Having reached that conclusion on the merits, the Court reversed the grant of an injunction. See *id.* at 1019. Applying traditional equitable principles, the Court held that "[e]quitable relief is not available to enjoin an alleged taking of private property for a public use" where the plaintiffs had an adequate remedy under

the Tucker Act. See *id.* at 1016-19. The Court then found that certain claims regarding the arbitration and compensation provisions of the statute were not "ripe," because contingent future events would determine whether these provisions would actually injure the plaintiff. *Id.* at 1019-20. Despite invoking "ripeness" in passing, *Monsanto* thus does not stand for the proposition that ripeness doctrine precludes district courts from considering Takings Clause claims on the merits. It distinguished between the equitable principles governing the availability of injunctive relief and ripeness principles governing claims based on contingent future events.

In *Williamson County Regional Planning Commission* v. *Hamilton Bank*, 473 U.S. 172 (1985), however, the Court restated the traditional rules regarding the availability of injunctive relief in terms of a constitutional rule governing the Court's jurisdiction:

> [T]aking claims against the Federal Government are premature until the property owner has availed itself of the process provided by the Tucker Act, 28 U.S.C. § 1491. *Monsanto*, 467 U.S., at 1016-20. Similarly, if a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and been denied just compensation.

Id. at 195.

This phrasing is the root of the panel's doctrinal error. The panel presupposed that parties may not invoke the Takings Clause even in cases that are otherwise ripe, and even when they are not seeking an injunction, unless they have first gone to the Court of

Federal Claims. No case prior to *Williamson County* had ever suggested anything of the sort. It may well be true that district courts may not issue an injunction on takings grounds against federal action if a reasonable, certain, and adequate Tucker Act remedy is available, see *Preseault* v. *Interstate Commerce Comm'n*, 494 U.S. 1, 17 (1990) — although even that is a more sweeping proposition than earlier cases support (see *supra*, pp. 36-38). But it certainly is not true that the rule is jurisdictional, that the rule applies when the Tucker Act remedy is pointless and duplicative, or that the rule applies when the property owner invokes the Takings Clause in a defensive posture rather than seeking an injunction.

This case does not call for reconsideration of the holding of *Williamson County*, because it does not involve *Williamson County*'s federalism and comity dimensions. See *San Remo Hotel, L.P.* v. *City & Cnty. of S.F.*, 545 U.S. 323, 345-347 (2005). Moreover, *Williamson County* arose in the context of an inverse condemnation action brought by the property owner, whereas in this case the property owner appears in a defensive posture and does not seek affirmative relief against the government, whether monetary or injunctive, but only reversal of an unconstitutional federal agency order.

This case does, however, provide the Court with an occasion to clarify that *Williamson County*'s prematurity rule, whatever its merits in its original context, does not turn on principles of "ripeness" and is not jurisdictional in nature. Already, in subsequent cases, this Court has seemingly backed away from the full jurisdictional categorization of the rule, calling it "prudential." *Suitum* v. *Tahoe Reg'l Planning Agency*, 520 U.S. 725, 736 n.7 (1997); see also *Stop*

the Beach Renourishment, Inc. v. *Florida Dep't of Envtl. Prot.*, 130 S. Ct. 2592, 2610 (2010) (stating that the rule is not "jurisdictional"). As illustrated by the proceedings below, however, the Ninth Circuit and other lower courts — as well as the United States government — continue to regard *Williamson County* as jurisdictional. See JA242 (government opposition to rehearing petition claiming that doctrine went to the court's "subject-matter jurisdiction" and hence "may be raised at any point in the litigation") (quotation omitted). For much the same reasons this Court has recently become more rigorous in distinguishing between jurisdictional and "claim-processing rules," see, *e.g.*, *Kontrick* v. *Ryan*, 540 U.S. 443, 454 (2004), and between jurisdiction and the substantive ingredients of a claim, see, *e.g.*, *Arbaugh* v. *Y & H Corp.*, 546 U.S. 500 (2006), it should distinguish in this case between ripeness and the equitable rules for obtaining injunctive relief.

2. A party need not pursue pointless duplicative proceedings before obtaining injunctive redress under the Takings Clause.

Although the *Apfel* plurality did not explicitly invoke the equitable principles of *Cherokee Nation*, the conclusion and reasoning of *Apfel* are entirely consistent with, indeed compelled by, those principles. The text, structure, and history of the Fifth Amendment establish that a private party may obtain injunctive relief in an affirmative lawsuit under the Takings Clause where the party lacks a "reasonable, certain, and adequate" monetary remedy. *Cherokee Nation*, 135 U.S. at 659. *Apfel* implements this "reasonableness" directive by eliminating the need for "pointless" and unnecessarily duplicative and burdensome pro-

cedures. 524 U.S. at 521; see *Lucas* v. *South Carolina Coastal Council*, 505 U.S. 1003, 1012 n.3 (1992); *MacDonald, Sommer, & Frates* v. *Yolo Cnty.*, 477 U.S. 340, 350 n.7 (1986); see also *Palazzolo* v. *Rhode Island*, 533 U.S. 606, 626 (2001). The *Apfel* plurality's reasoning thus fits squarely within the pattern of the historical cases discussed above.

3. A party may invoke the Takings Clause as a defense to government-initiated enforcement action.

Petitioners also may invoke their rights under the Takings Clause as a defense to a government-initiated action. When the government initiates an action, the private party is entitled to raise its constitutional rights as a defense. Because the party does not seek an affirmative injunction, it need not establish that it satisfies the equitable criteria for injunctive relief, such as that it lacks an adequate remedy at law.

1. In *Missouri Pacific Railway*, the Court considered a suit "brought by the state to recover a fine of $500 imposed by the law for failure to obey [the State of Nebraska's statutory] command," to which the railway company raised a constitutional defense predicated on the constitutional protection for property. 217 U.S. at 204. In an opinion by Justice Holmes, the Court held that the statute "unquestionably does take [the railroad's] property." *Id.* at 205. The Court thus permitted the railroad to raise a constitutional defense to the imposition of the penalty, rather than remain subject to the "peril of a fine" that was unconstitutional because it enforced an unconstitutional statute. *Id.* at 207-208. The Court did not ask whether there was an adequate alternative remedy at

law, because that was not a necessary precondition to raising a legal defense to a fine.

This approach was utterly routine, and consistent with prior state and federal cases. Nineteenth Century cases frequently addressed defenses based on the Takings Clause. For example, in *St. Louis and San Francisco Railway* v. *Gill*, 156 U.S. 667 (1895), the Court considered a case in which a plaintiff alleged that a defendant railroad had exceeded the maximum rate permissible under a state statute, and the defendant argued that the rate law was "a taking of private property for public use without compensation, and is therefore in violation of the fifth and fourteenth amendments to the constitution of the United States." *Id.* at 653-654. The Court rejected the takings argument on the merits without ever suggesting that it could not be brought as a defense. See *id.* at 665-667; see also *Union Bridge Co.* v. *United States*, 204 U.S. 364 (1907) (rejecting merits of takings defense to criminal prosecution); *Chicago, Burlington, & Quincy Ry.* v. *Illinois*, 200 U.S. 561, 565 (1906) (adjudicating takings defense raised in mandamus action); *Sanborn* v. *Belden*, 51 Cal. 266, 268 (1876) (allowing Takings Clause to be raised by defendant because, where plaintiff corporation condemns property, "it is at least essential that an adequate fund * * * be provided, from which the owner of the property [c]an certainly obtain compensation"); *San Mateo Waterworks*, 50 Cal. at 285 (allowing defendant to raise Takings Clause as a defense); *Cal. Pac. R.R.* v. *Cent. Pac. R.R. of Cal.*, 47 Cal. 528, 530 (1874) (vacating trial court order because it allowed plaintiff to achieve taking without just compensation, stating defendant "is not bound to wait until the injury is done, but may demand relief by way of protection against

injuries contemplated by the order itself").

2. Both *Ex parte Young* and this Court's Nineteenth Century takings cases established that an injunction could be obtained in an affirmative lawsuit where an adequate remedy at law was lacking. Those decisions expanded the remedies available for constitutional violations by allowing anticipatory relief in advance of actual enforcement of the challenged law. They did not cut back, however, on the long-established right of parties to raise constitutional provisions, including the Takings Clause, as a defense to enforcement actions.

This Court's precedents interpreting *Ex parte Young* make that distinction clear. *Ex parte Young* permits an affirmative injunctive claim upon a showing of (1) a legal defense to an impending legal action and (2) an argument that waiting to assert the defense at law would not be an adequate remedy. See John Harrison, *Ex parte Young*, 60 STAN. L. REV. 989, 997-999, 1014 (2008); see also *Va. Office for Prot. & Advocacy* v. *Stewart*, 131 S. Ct. 1632, 1642 (2011) (Kennedy, J., concurring) (*Ex parte Young* involves "pre-emptive assertion in equity of a defense that would otherwise have been available in the State's enforcement proceedings at law"); *Douglas* v. *Indep. Living Ctr. of S. Cal., Inc.*, 132 S. Ct. 1204, 1213 (2012) (Roberts, C.J., dissenting) (same). A party raising a defense need not establish the latter point. See, *e.g.*, John Willard, *A Treatise on Equity Jurisprudence* 348 (Platt Potter ed., 2d ed. 1875) ("[I]t is well settled that equity will not restrain an action at law by a preliminary injunction, on the application of the defendant in such action, if he has a perfect defense at law. Unless the injunction is necessary to make the defense available * * * ."). Indeed, *Ex parte*

Young took it as a given that "the company could [] interpose this defense in an action to recover penalties or upon the trial of an indictment * * * ." 209 U.S. at 165. The Court cited *Gill*, a takings case discussed above, for this settled and undisputed proposition. See *id.*

In a similar vein, the Court later explained that, even where a party could not "interfere by injunction with the state's collection of its revenues," if the state commences an action against a citizen who refuses to pay, "he can interpose his objections by way of defense." *Atchison, Topeka, & Santa Fe Ry.* v. *O'Connor*, 223 U.S. 280, 285-286 (1912) (citing, among other cases, *Ex parte Young*). And the Court explained that *Ex parte Young*'s "broader right to invoke a complete remedy to enjoin the law * * * did not take away the narrower right of a [party] to stand upon the defensive, and merely resist the attempt to enforce" the law. *Missouri* v. *Chicago, Burlington, & Quincy R.R.*, 241 U.S. 533, 539 (1916).

Thus, it is black-letter law that a party may raise a constitutional defense to a government enforcement action without any showing that other monetary remedies are inadequate. See *Missouri Pac. Ry.*, 217 U.S. at 205-208; see also *Wisconsin* v. *Yoder*, 406 U.S. 205 (1972); *Lambert* v. *California*, 355 U.S. 225 (1957). There is no reason to treat takings claims any differently. See *Dolan* v. *City of Tigard*, 512 U.S. 374, 392 (1994) ("We see no reason why the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as the First Amendment or Fourth Amendment, should be relegated to the status of a poor relation in these comparable circumstances."). Where the Tucker Act does create a "reasonable, certain, and adequate" remedy at law, a private party

cannot obtain affirmative injunctive relief. But even then, the Takings Clause still can be raised as a defense to government action.

3. In sum, limitations on the ability of claimants to invoke the Takings Clause in advance of a Tucker Act claim arise from traditional equitable principles governing the availability of an injunctive remedy. So understood, the *Apfel* plurality correctly determined that plaintiffs are not required to undertake duplicative proceedings to challenge requirements of direct transfers of cash mandated by the government, and Justice Holmes correctly held in *Missouri Pacific Railway* that parties can invoke the Takings Clause as a defense to unconstitutional fines.

II. Under the AMAA, petitioners have the right and obligation to bring their takings claim in administrative proceedings rather than in the Court of Federal Claims under the Tucker Act.

Even assuming that petitioners may not raise their takings claim either to challenge a "direct transfer of money" or as a defense in a government-initiated action, reversal would still be required on an *independent* basis as a matter of *statutory* law. The panel recognized that the AMAA "'provides an administrative remedy to handlers wishing to challenge marketing orders under the AMAA'" and "'vests the district courts with jurisdiction to review the Secretary's decision.'" JA257 (quoting *Lion Raisins, Inc.* v. *United States*, 416 F.3d 1356, 1370 (Fed. Cir. 2005)). The panel determined, however, that petitioners' takings claim was brought "not in their capacity as handlers but in their capacity as producers" and therefore not subject to "administrative exhaustion re-

quirements," JA304-305 — notwithstanding the fact that the set-aside and fine were applicable to petitioners *only* because the USDA classified petitioners as "handlers." The panel's holding that petitioners "may" — and therefore must — "bring the[ir] takings claim" in the Court of Federal Claims, JA306, misunderstands the scope of the AMAA's withdrawal of the Tucker Act.

In the AMAA, Congress provided that "any handler" of raisins that is subject to a marketing order must bring *all* challenges, including constitutional challenges, to any order entered against it before the USDA itself, subject to review in federal district court. See *United States* v. *Ruzicka*, 329 U.S. 287, 294 (1946). As the panel and the government agree, the AMAA's comprehensive regulatory scheme thus withdraws the Tucker Act insofar as it applies. The only point of disagreement is whether that comprehensive regulatory scheme applies to petitioners' takings claim.

1. Because the Tucker Act is a creature of Congress, Congress may freely "withdraw[] the Tucker Act grant of jurisdiction" by statute. *Apfel*, 524 U.S. at 520. As the Court explained earlier this Term in the closely related context of the Little Tucker Act, where "a statute contains its own self-executing remedial scheme," a court "look[s] *only* to that statute * * * ." *United States* v. *Bormes*, 133 S. Ct. 12, 17 (2012) (emphasis added; unanimous); see *Hinck* v. *United States*, 550 U.S. 501, 506 (2007) ("specific remedy" withdraws the Tucker Act); *Lion Raisins*, 416 F.3d at 1372 (observing that the Federal Circuit has "repeatedly held that Tucker Act review of takings claims is precluded where Congress has provided a specific and comprehensive scheme for administrative

and judicial review") (quotations omitted). That is because these statutes are "general in character and must give way to an applicable special provision in any other federal statute." 14 Charles A. Wright *et al.*, *Federal Practice & Procedure* § 3657 & n.33 (3d ed. 1998) (collecting cases).

A statutory scheme withdraws the Tucker Act when it "provides a forum for adjudication, a limited class of potential plaintiffs, a statute of limitations, a standard of review, and authorization for judicial relief." *Hinck*, 550 U.S. at 506; see *Bormes*, 133 S. Ct. at 19. The question is whether the statutory scheme is comprehensive, and "[t]he answer [to that question] is to be found by examining the purpose of the [statute], the entirety of its text, and the structure of review that it establishes." *United States* v. *Fausto*, 484 U.S. 439, 444 (1988). The creation of a detailed, specific scheme for administrative and judicial review is strong evidence that Congress intended to withdraw the Tucker Act's more general grant of jurisdiction. See, *e.g.*, *United States* v. *Erika, Inc.*, 456 U.S. 201, 208 (1982) (focusing on the "statute's precisely drawn provisions" for review).

2. The AMAA satisfies these standards. The AMAA splits its mechanism for administrative and judicial review between two connected provisions: Section 608c(14)(B) and Section 608c(15)(B). The primary distinction between the two is whether the agency or a private party initiates the agency action. Under both provisions, the initial forum for adjudication is within the USDA, with judicial review in the district court where the private party resides or has its principal place of business. 7 U.S.C. §§ 608c(14)(B), (15)(B); see *Block* v. *Cmty. Nutrition Inst.*, 467 U.S. 340, 346 (1984) (handler must first

avail itself of whatever "administrative remedies" are "made available by the Secretary"). Only "handlers" may challenge USDA orders under either provision. 7 U.S.C. §§ 608c(14)(B), (15)(B). A USDA order may be set aside if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." JA133. Between the two sections, the AMAA provides the full panoply of remedies. If the private party challenges an order entered against it — including an order to pay money to the government — the court may reverse that order under section 608c(14)(B). If the private party seeks prospective relief against a provision of the marketing order, section 608c(15)(B) authorizes the district court to exercise "jurisdiction in equity" to award not only injunctive but "monetary relief, in the form of equitable restitution." *Lion Raisins*, 416 F.3d at 1371-372; see *Tull* v. *United States*, 481 U.S. 412, 424 (1987) ("[A] court in equity may award monetary restitution* * * ."). This comprehensive and mandatory scheme leaves no room for Tucker Act jurisdiction in the Court of Federal Claims.

That is equally true for both constitutional and statutory challenges to orders issued under the Act. As this Court has explained, "[e]ven when [challenges] are formulated in constitutional terms, they are questions of law arising out of, or entwined with, factors that call for understanding of the [ ] industry. And so Congress has provided that the remedy in the first instance must be sought from the Secretary of Agriculture." *Ruzicka*, 329 U.S. at 294; see also *Elgin* v. *Dep't of Treasury*, 132 S. Ct. 2126, 2130 (2012) (Congress may channel constitutional claims through "'comprehensive'" remedial schemes) (quoting *Fausto*, 484 U.S. at 455); *Lion Raisins*, 416 F.3d at 1358, 1370-371 (holding, at government's request, that rai-

sin producer-handler's "takings claim may not be brought against the government" in the Court of Federal Claims, because the AMAA "provides an administrative remedy to handlers wishing to challenge marketing orders under the AMAA").

3. Neither the government nor the panel disputed that the AMAA withdraws the Tucker Act for takings claims brought by "handlers" of raisins. Instead, the panel held and the government argues that the Hornes are not handlers of raisins for purposes of their takings claim, which according to the panel and the government, is brought "in their capacity as producers." JA305. This is sheer doubletalk. The Raisin Marketing Order applies to petitioners in the first place only in their capacity as handlers, because the USDA has no authority to impose fines against the Hornes in their capacity as producers. JA293-294 ("Marketing orders under the AMAA apply only to 'handlers' * * * and do not apply to any producer 'in his capacity as a producer.'"); JA298 (USDA's "mandatory raisin reserve program * * * requirements apply only to handlers"); 7 U.S.C. §§ 608c(14)(A)-(B) (creating liability for "handlers"); § 608c(13)(B) ("No order issued under this chapter shall be applicable to any producer in his capacity as a producer."); *Lion Raisins*, 416 F.3d at 1359 ("[P]roducers are not directly bound by the statute * * * ."). It was the Hornes who argued, unsuccessfully, that they were not subject to the set-aside because they were not handlers. They lost on that statutory argument. Having been required "in their capacity as handlers" to give raisins or their monetary equivalent to the government, the government cannot turn around and claim that the Hornes' constitutional defense against that exaction is brought in some other capacity.

Distinguishing between handlers bringing their takings claim "in their capacity as handlers" from those doing so "in their capacity as producers" conflicts not only with the litigating position of the government in this case, but also with the text and structure of the AMAA. Under the AMAA, "*[a]ny* handler" seeking to challenge an order must exhaust administrative remedies before the Secretary of Agriculture. 7 U.S.C. §§ 608c(14)(A), (15)(A) (emphasis added). The exhaustion requirement is triggered by the identity of the party as a handler, not by the nature of the issue or the "capacity" in which it is brought. If a party is a "handler," he must exhaust his claims before the agency and seek review in district court.

The term "handler" includes anyone "engaged in the handling" of raisins. § 608c(1); see also 7 C.F.R. § 989.15. Nothing in the Act provides for separate treatment of "handlers" who also happen to be "producers," such that a "producer-handler" challenging a reserve requirement for its own raisins somehow falls outside the scope of the statute. Instead, the statute says "any handler" can bring its claims before the agency. "'Read naturally, the word "any" has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'" *Ali* v. *Fed. Bureau of Prisons*, 552 U.S. 214, 219 (2008) (quoting *United States* v. *Gonzales*, 520 U.S. 1, 5 (1997), in turn quoting *Webster's Third New Int'l Dictionary* 97 (1976)); see also *Harrison* v. *PPG Indus., Inc.*, 446 U.S. 578, 588-589 (1980) ("any" betrays no "uncertainty" and is not subject to a "limiting construction"). "[I]n any case of statutory construction, our analysis begins with the language of the statute. And where the statutory language provides a clear answer, it ends there as well." *Hughes Aircraft Co.* v. *Jacobson*, 525 U.S. 432,

438 (1999) (citation and quotation marks omitted).

The USDA's regulations underscore this point. The agency has broadly declared that "[t]he term handler means *any* person who, by the terms of a marketing order, is subject thereto, or to whom a marketing order is sought to be made applicable." 7 C.F.R. § 900.51(i) (emphasis added). The government nowhere disputes that petitioners meet that definition, nor could it. See *United States* v. *Nixon*, 418 U.S. 683, 696 (1974) ("So long as this regulation remains in force the Executive Branch is bound by it * * * .").

Likewise, the AMAA's structure compels the conclusion that handlers, including so-called producer-handlers, must raise takings claims through the administrative process and not by recourse to the Tucker Act. "Congress intended that judicial review of market[ing] orders issued under the [AMAA] ordinarily be confined to suits brought by handlers," *Block*, 467 U.S. at 348, as handlers "can [ ] be expected to challenge unlawful agency action and to ensure that the statute's objectives will not be frustrated," *id.* at 352. Channeling petitioners' challenge through administrative processes allows the USDA to apply its technical knowledge to the question in the first instance, potentially avoiding the need for a constitutional determination altogether. See, *e.g.*, *Saulsbury Orchards & Almond Processing, Inc.* v. *Yeutter*, 917 F.2d 1190, 1195 (9th Cir. 1990); see also *Block*, 467 U.S. at 347-348 (AMAA is a "complex and delicate administrative scheme" whose functioning depends on the Secretary's "technical * * * expertise").

Not only does the panel's holding have no legal basis, it makes little sense. Under the panel's ap-

proach, producer-handlers sometimes must bring takings claims to the USDA, but other times to the Court of Federal Claims. For example, although under the government's theory, petitioners' challenge to the requirement that they pay the monetary equivalent of the reserve raisins is brought in their capacity as producers, their challenge to the civil penalty for failing to do so is surely brought in their capacity as handlers, since that aspect of the fine can be imposed only on handlers. Yet the constitutional challenges to these two parts of the fine rise and fall together. If it is unconstitutional to take raisins or their monetary equivalent without just compensation, it is likewise unconstitutional to fine a party for not complying with the unconstitutional requirement. The Hornes, wearing their "handler" hat, cannot effectually challenge their civil fine without also challenging the constitutionality of the underlying order.

Similarly, if the Hornes wished to challenge the USDA's calculation of the amount it will pay for the reserve raisins, they would do so in their capacity as handlers even under the government's theory. Yet in a particular case, proper calculation of this amount could effectively provide just compensation, thus obviating the takings injury to the Hornes in their "capacity as producers." This means that the Hornes, in their "capacity as producers," cannot raise a legal defect in the calculation of the amount of compensation to which they are entitled, thus precipitating a completely unnecessary takings claim.

Because the Hornes are the same people, with the same interests, whether they are said to be producers or handlers, and since their statutory and constitutional rights are closely intertwined, it makes no sense to bifurcate their claims in this crazy-quilt fa-

shion. See *Kloeckner* v. *Solis*, 133 S. Ct. 596, 605 (2012) (rejecting government's "roundabout way of bifurcating judicial review").

Such case-by-case determination is a recipe for pointless complexity and error in an area where "administrative simplicity is a major virtue." *Hertz Corp.* v. *Friend*, 130 S. Ct. 1181, 1193 (2010) ("Complex jurisdictional tests complicate a case, eating up time and money as the parties litigate, not the merits of their claims, but which court is the right court to decide those claims."). By requiring a case-specific appraisal of the "capacity" in which an entity pursues its legal claims, the panel's approach needlessly multiplies administrative and judicial proceedings. As here, the Takings Clause is often just one defense among many that a producer-handler might advance. Under the panel's decision, although a handler would have to bring all non-takings defenses to the USDA, that exact same handler sometimes — but sometimes not, depending on the "capacity" in which the defense is brought — would have to bring its takings claim to the Court of Federal Claims. "It is unlikely — to say the least — that Congress intended to establish such a chaotic regulatory structure." *Int'l Paper Co.* v. *Ouellette*, 479 U.S. 481, 497 (1987).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

BRIAN C. LEIGHTON
Attorney at Law
701 Pollasky Avenue
Clovis, CA 93612
(559) 297-6190

MICHAEL W. MCCONNELL*
ADITYA BAMZAI
JOSEPH CASCIO
AARON L. NIELSON
Kirkland & Ellis LLP
655 Fifteenth Street, N.W.
Washington, DC 20005
(202) 879-5000
michael.mcconnell@kirkland.com
**Counsel of Record*

Counsel for Petitioners

January 9, 2013

RESPONDENT'S BRIEF

No. 12-123

In the Supreme Court of the United States

MARVIN D. HORNE, ET AL., PETITIONERS

v.

UNITED STATES DEPARTMENT OF AGRICULTURE

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record
STUART F. DELERY
Principal Deputy Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
JOSEPH R. PALMORE
Assistant to the Solicitor General
MICHAEL S. RAAB
JOSHUA WALDMAN
Attorneys
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

RAMONA E. ROMERO
General Counsel
CARRIE F. RICCI
Assistant General Counsel
LESLIE K. LAGOMARCINO
Senior Counsel
Department of Agriculture
Washington, D.C. 20250

Law Library

QUESTION PRESENTED

Whether the court of appeals correctly held that a Just Compensation Clause challenge to the raisin marketing order, 7 C.F.R. Pt. 989, brought by a producer-handler in its capacity as a producer, must be brought in the Court of Federal Claims pursuant to the Tucker Act, 28 U.S.C. 1491(a)(1).

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 2
Constitutional and statutory provisions involved 2
Statement 2
Summary of argument 17
Argument:
Petitioners' just compensation claim cannot be brought in this action under 7 U.S.C. 608c(14) for judicial review of a USDA order entered against petitioners as handlers 21
A. Property owners have no just compensation claim against the federal government if compensation may be obtained under the Tucker Act 21
B. Petitioners may not assert producer claims in an AMAA handler proceeding 25
C. Petitioners' various contentions for establishing jurisdiction lack merit 29
1. Any exception to the Tucker Act for a "direct transfer of funds" has no application here 29
2. Property owners may not assert the Just Compensation Clause as a "defense" to a government enforcement action where injunctive relief would be unavailable 39
3. The AMAA's language, context, and history do not reflect a congressional preference for an injunction over the payment of compensation in circumstances such as those present here 49
Conclusion 55
Appendix — Statutory provisions 1a

TABLE OF AUTHORITIES

Cases: Page

Arkansas Dairy Coop. Ass'n v. *USDA*, 573 F.3d 815 (D.C. Cir. 2009), cert. denied, 558 U.S. 1133 (2010) 28
Baring v. *Erdman*, 2 F. Cas. 784 (C.C.E.D. Pa. 1834).....44
Barron v. *Baltimore*, 32 U.S. (7 Pet.) 243 (1833).....44
Bennis v. *Michigan*, 516 U.S. 442 (1996) 32
Biltmore Forest Broad. FM, Inc. v. *United States*, 555 F.3d 1375 (Fed. Cir.), cert. denied, 558 U.S. 990 (2009) 26
Block v. *Community Nutrition Inst.*, 467 U.S. 340 (1984) 2, 37, 51
Bloodgood v. *Mohawk & Hudson R.R.*, 18 Wend. 9 (N.Y. 1837).....45
Bonaparte v. *Camden & A.R. Co.*, 3 F. Cas. 821 (C.C.N.J. 1830).....44
Boston Chamber of Commerce v. *City of Boston*, 217 U.S. 189 (1910) 36
Brown v. *Legal Found. of Washington*, 538 U.S. 216 (2003) 21, 35, 37
Cal-Almond, Inc. v. *United States*, 30 Fed. Cl. 244 (1994), aff'd, 73 F.3d 381 (Fed. Cir. 1995), cert. denied, 519 U.S. 963 (1996).....25
California Pac. R.R. v. *Central Pac. R.R.*, 47 Cal. 528 (1874) 46
Chicago, Burlington & Quincy R.R. v. *Chicago*, 166 U.S. 226 (1897) 44
Chicago, Burlington & Quincy Ry. v. *Illinois*, 200 U.S. 561 (1906) 43
Dairylea Coop., Inc. v. *Butz*, 504 F.2d 80 (2d Cir. 1974) 28

Cases—Continued: Page

Eastern Enters. v. *Apfel*, 524 U.S. 498 (1998) ..... *passim*
Edaleen Dairy, LLC v. *Johanns*, 467 F.3d 778 (D.C. Cir. 2006) 28
Evans v. *United States*, 74 Fed. Cl. 554 (2006), aff'd, 250 Fed. Appx. 321 (Fed. Cir. 2007), cert. denied, 552 U.S. 1187 (2008) 25
FCC v. *Florida Power Corp.*, 480 U.S. 245 (1987) 26
FCC v. *ITT World Commc'ns, Inc.* 466 U.S. 463 (1984) 26
First English Evangelical Lutheran Church v. *County of L.A.*, 482 U.S. 304 (1987) 21, 47
Folden v. *United States*, 379 F.3d 1344 (Fed. Cir. 2004), cert. denied, 545 U.S. 1127 (2005) 26
Glickman v. *Wileman Bros. & Elliott, Inc.*, 521 U.S. 457 (1997) 2
Hettinga v. *United States*, 560 F.3d 498 (D.C. Cir. 2009), cert. denied, No. 12-506 (Jan. 7, 2013) 28
Hodel v. *Virginia Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264 (1981) 22, 46
Hurley v. *Kincaid*, 285 U.S. 95 (1932) 40
Kaiser Aetna v. *United States*, 444 U.S. 164 (1979) 43
Larson v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949) 22, 40, 47
Lion Raisins, Inc. v. *United States*, 416 F.3d 1356 (Fed. Cir. 2005) 5, 6, 26, 28, 38
Lucas v. *South Carolina Coastal Council*, 505 U.S. 1003 (1992) 15
Miller v. *Schoene*, 276 U.S. 272 (1928) 43
Missouri Pac. Ry. v. *Nebraska*, 217 U.S. 196 (1910) 43
Osborne v. *Missouri Pac. Ry.*, 147 U.S. 248 (1893) 45

Cases—Continued: Page

Penn Cent. Transp. Co. v. *New York City*, 438 U.S. 104 (1978) 15
Perry v. *Wilson*, 7 Mass. 393 (1811) 45
Preseault v. *ICC*, 494 U.S. 1 (1990) 23, 50
Pruneyard Shopping Ctr. v. *Robins*, 447 U.S. 74 (1980) 43, 44
Pumpelly v. *Green Bay & Miss. Canal Co.*, 80 U.S. (13 Wall.) 166 (1872) 45
Regional Rail Reorganiztion Act Cases, 419 U.S. 102 (1974) 22, 23, 35, 46, 52
Ruckelshaus v. *Monsanto Co.*, 467 U.S. 986 (1984) 23, 24, 46
San Remo Hotel, L.P. v. *City & County of S.F.*, 545 U.S. 323 (2005) 24
Sanborn v. *Belden*, 51 Cal. 266 (1876) 45
Sinnickson v. *Johnson*, 17 N.J.L. 129 (1839) 45
Smyth v. *Ames*, 169 U.S. 466 (1898), overruled on other grounds, 315 U.S. 575 (1942) 45
St. Louis & S.F. Ry. v. *Gill*, 156 U.S. 649 (1895) 43
Thacher v. *Dartmouth Bridge Co.*, 35 Mass. 501 (1836) 45
Union Bridge Co. v. *United States*, 204 U.S. 364 (1907) 43
United States v. *Bormes*, 133 S. Ct. 12 (2012) 26
United States v. *Erika, Inc.*, 456 U.S. 201 (1982) 26
United States v. *Rands*, 389 U.S. 121 (1967) 36
United States v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985) 25, 40
United States v. *Rock Royal Coop., Inc.*, 307 U.S. 533 (1939) 2
United States v. *Tohono O'Odham Nation*, 131 S. Ct. 1723 (2011) 48

Cases—Continued: Page

Virginia Office for Prot. & Advocacy v. *Stewart*, 131 S. Ct. 1632 (2011) 41
Williamson Cnty. Reg'l Planning Comm'n v. *Hamilton Bank*, 473 U.S. 172 (1985) ..... *passim*
Yearsley v. *W.A. Ross Constr. Co.*, 309 U.S. 18 (1940) 23

Constitution, statutes and regulations:

U.S. Const.:
Amend I .....
Amend. V 2, 16, 21, 29, 37
Due Process Clause 32
Just Compensation Clause (Takings Clause) ..... *passim*
Amend. VIII 14, 32
Excessive Fines Clause 32
Act of Mar. 3, 1887, ch. 359, 24 Stat. 505 44
Agricultural Adjustment Act, ch. 25, Tit. I, 48 Stat. 31 (7 U.S.C. 601 *et seq.*) 2
7 U.S.C. 601 ..... 2, 51
7 U.S.C. 602 53
7 U.S.C. 602(1) 51
7 U.S.C. 608c(1) 3
7 U.S.C. 608c(5) 28
7 U.S.C. 608c(6) 53
7 U.S.C. 608c(6)(A) 3, 53
7 U.S.C. 608c(6)(B) 3, 53
7 U.S.C. 608c(6)(C) 3, 53
7 U.S.C. 608c(6)(D) 53
7 U.S.C. 608c(6)(E) 3, 5, 6, 53

Statutes and regulations—Continued: Page

7 U.S.C. 608c(8) 4, 50
7 U.S.C. 608c(9) 4
7 U.S.C. 608c(9)(B) 50
7 U.S.C. 608c(13)(A) 28
7 U.S.C. 608c(13)(B) 3, 17, 26, 28, 39
7 U.S.C. 608c(14) 4, 27, 29
7 U.S.C. 608c(14)(B) ..... *passim*
7 U.S.C. 608c(15)(A) 16, 25, 28
7 U.S.C. 608c(16)(A)(i) 53
7 U.S.C. 608c(16)(B) 4, 50
Agricultural Marketing Agreement Act of 1937, ch. 296, 50 Stat. 246 ..... *passim*
Coal Industry Retiree Health Benefits Act of 1992, 26 U.S.C. 9701 *et seq.* 29
Farmer-to-Consumer Direct Marketing Act of 1976, 7 U.S.C. 3001-3006 12
Tucker Act, 28 U.S.C. 1491(a)(1) ..... *passim*
28 U.S.C. 1346(a)(2) (Supp. V 2011) 23
47 U.S.C. 402 (2006 & Supp. V 2011) 26
7 C.F.R.:
Pt. 3:
Section 3.91(b)(1)(vii) 7
Pt. 989 4
Section 989.11 4
Section 989.14 3
Section 989.15 ..... 3, 13
Section 989.17 11
Section 989.26 5

Regulations—Continued: Page

Section 989.29 5
Section 989.30 5
Section 989.53(a) 6, 36
Section 989.54(d) 5
Section 989.55 5
Section 989.58 36
Section 989.58(d) 7, 12, 35
Section 989.65 ..... 5, 6
Section 989.66 12
Section 989.66(a) 6
Section 989.66(h) 6
Section 989.67 6
Section 989.73 7
Section 989.73(a) 12
Section 989.73(b) 12
Section 989.73(d) 12
Section 989.77 ..... 7, 12
Section 989.80 ..... 7, 12
Section 989.91 53
Section 989.91(c) 4
Section 989.166 12
Section 989.166(c) 8, 38

Miscellaneous:

50 Fed. Reg. 26,977 (July 1, 1985) 53
60 Fed. Reg. 33,679-33,681 (June 29, 1995 53
71 Fed. Reg. (May 23, 2006):
p. 29,565 38
p. 29,567 4
p. 29,569 ..... 4, 38

Miscellaneous—Continued: Page

p. 29,570 36
76 Fed. Reg. 18,004 (Apr. 1, 2011) 7
Raisin Admin. Comm. (Cal.):
Marketing Policy & Industry Statistics: 2012-2013 Marketing Season (Oct. 3, 2012), http://www.raisins.org/images/marketing_policy_2012.pdf 6, 7
Memo to All 2003-04 Natural (sun-dried) Seedless Growers regarding 2003-04 Natural (sun-dried) Seedless Reserve Pool (June 23, 2008) 7
Minutes of the Meeting (Apr. 12, 2007) 7

In the Supreme Court of the United States

No. 12-123

MARVIN D. HORNE, ET AL., PETITIONERS

v.

UNITED STATES DEPARTMENT OF AGRICULTURE

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the court of appeals, as amended (J.A. 289-311), is reported at 673 F.3d 1071. The court of appeals' decision prior to amendment (J.A. 186-214) is unreported but is available at 2011 WL 2988902. The opinion of the district court (J.A. 119-184) is unreported, but is available at 2009 WL 4895362. The decision of the judicial officer of the United States Department of Agriculture (USDA) (J.A. 50-94) and his order granting reconsideration (J.A. 95-118) are reported respectively at 67 Agric. Dec. 18 and 67 Agric. Dec. 1244. The decision of the USDA administrative law judge (J.A. 24-49) is reported at 65 Agric. Dec. 805.

JURISDICTION

The original judgment of the court of appeals was entered on July 25, 2011. The court of appeals issued an amended judgment on March 12, 2012. On June 1, 2012,

Justice Kennedy extended the time within which to file a petition for a writ of certiorari to and including July 25, 2012, and the petition was filed on that date. The petition for a writ of certiorari was granted on November 20, 2012. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in relevant part: "nor shall private property be taken for public use, without just compensation." Pertinent statutory and regulatory provisions are reprinted in an appendix to this brief.

STATEMENT

1. The Agricultural Marketing Agreement Act of 1937 (AMAA), ch. 296, 50 Stat. 246, was enacted during the Great Depression "in response to plummeting commodity prices, market disequilibrium, and the accompanying threat to the nation's credit system." J.A. 291; see 7 U.S.C. 601.[1] The AMAA "contemplates a cooperative venture" among the Secretary of Agriculture (Secretary), agricultural producers, and handlers, "the principal purposes of which are to raise the price of agricultural products and to establish an orderly system for marketing them." *Block* v. *Community Nutrition Inst.*, 467 U.S. 340, 346 (1984); see 7 U.S.C. 602 (declaration of policy); *Glickman* v. *Wileman Bros. & Elliott, Inc.*, 521 U.S. 457, 461-462 (1997).

To achieve these goals, the Secretary is authorized to promulgate marketing orders that regulate the "han-

---

[1] The AMAA reenacted and amended the Agricultural Adjustment Act, ch. 25, Tit. I, 48 Stat. 31 (1933) (7 U.S.C. 601 *et seq.*). See *United States* v. *Rock Royal Coop., Inc.*, 307 U.S. 533, 542 & n.5 (1939).

dling of [certain] agricultural commodit[ies] or product[s] thereof," in interstate or foreign commerce. 7 U.S.C. 608c(1). The Secretary may choose among various market regulation tools, such as limiting the total quantity of a commodity or product that can be marketed or transported, 7 U.S.C. 608c(6)(A) and (C); allotting the amount that each handler may purchase from or handle on behalf of any or all producers, 7 U.S.C. 608c(6)(B); or (as directly relevant here) establishing "reserve pools of any such commodity or product" and "providing for the equitable distribution of the net return derived from the sale thereof among the persons beneficially interested therein," 7 U.S.C. 608c(6)(E).

Marketing orders do not directly regulate "producers" (*i.e.*, the farmers) who grow the agricultural commodities. Instead, marketing orders directly regulate only the "handlers" of agricultural commodities and products (*i.e.*, those who process the products for marketing). See 7 U.S.C. 608c(1) (marketing orders "shall regulate * * * *only such handling* of such agricultural commodity, or product thereof") (emphasis added).[2] The AMAA thus specifies that "[n]o order issued under this chapter shall be applicable to any producer in his capacity as a producer." 7 U.S.C. 608c(13)(B). Accordingly, only a handler, and not a producer, is subject to

---

[2] See also 7 C.F.R. 989.15 (defining "handler" to include, inter alia, "[a]ny processor or packer" or "any person who places, ships, or continues natural condition raisins in the current of commerce"); 7 C.F.R. 989.14 (defining "packer" to mean "any person who, within the area, stems, sorts, cleans, or seeds raisins, grades stemmed raisins, or packages raisins for market as raisins").

civil penalties for violating a marketing order. 7 U.S.C. 608c(14).[3]

While marketing orders do not directly regulate producers, the AMAA does grant producers certain rights with respect to those orders. In general, a marketing order proposed by the Secretary does not become effective unless approved by two-thirds of producers (by number or by volume of production). 7 U.S.C. 608c(8) and (9).[4] Similarly, the Secretary must terminate any marketing order when termination is favored by more than 50% (by volume) of the producers. 7 U.S.C. 608c(16)(B); 7 C.F.R. 989.91(c).

2. This case concerns the marketing order that regulates the market for California raisins. See 7 C.F.R. Pt. 989. The California raisin industry accounts for 99.5% of the domestic supply, and 40% of the world's supply, of raisins. J.A. 295 n.9. The grapes used for raisins can also be marketed as fresh grapes or crushed to produce wine or juice concentrate. See 71 Fed. Reg. 29,567, 29,569 (May 23, 2006). Price changes in all those markets, in addition to the impact of weather variability on the sun-drying process for raisins, can lead to wide swings in the supply of raisins, "result[ing] in producer price instability and disorderly market conditions." *Ibid.*

---

[3] The raisin marketing order defines a producer as "any person engaged in a proprietary capacity in the production of grapes which are sun-dried or dehydrated by artificial means until they become raisins." 7 C.F.R. 989.11.

[4] The marketing orders must also be approved by at least 50% (by volume) of handlers, except that the Secretary can override a refusal by the handlers if that refusal tends to prevent the effectuation of the declared policy of the AMAA, the order is the only practical means of advancing the interests of producers, and the requisite number of producers approve the order. 7 U.S.C. 608c(9).

Following a spike in production that resulted in a price drop from $235 per ton to $40-$60 per ton, USDA in 1949 issued the marketing order for California raisins "at the request of the raisin industry." J.A. 38, 294 & 295 n.9. After that steep decline in prices, "[t]he Raisin Marketing Order, like other fruit and vegetable orders established pursuant to the AMAA, [sought] to stabilize producer returns by limiting the quantity of raisins sold by handlers in the domestic competitive market." *Lion Raisins, Inc.* v. *United States*, 416 F.3d 1356, 1359 (Fed. Cir. 2005). The order maintains a stable market price by, under certain circumstances, controlling raisin supply through the establishment of annual "reserve pools" of raisins that will not be released into the open domestic market. See 7 U.S.C. 608c(6)(E); 7 C.F.R. 989.54(d), 989.65.

The raisin marketing order established the Raisin Administrative Committee (RAC), consisting of 47 members, with 35 representing producers, 10 representing handlers, one representing the cooperative bargaining associations, and one member of the public. See 7 C.F.R. 989.26, 989.29, 989.30. Producers and handlers nominate their representatives to the RAC and vote for their preferred candidates; the Secretary selects from those nominees or other eligible producers and handlers. See *ibid.*

Every year, the RAC reviews the crop yield, inventories, and shipments and determines whether to recommend that the Secretary establish a reserve pool. If the RAC recommends a reserve pool, it further recommends what portion of the year's production should be included in it (the "reserve percentage"), with the balance made available for sale on the open market (the "free percentage"). 7 C.F.R. 989.54(d), 989.55, 989.65. Based on the

percentages recommended by the RAC and set by the Secretary, the raisins that a handler receives from producers are divided into two groups: "free tonnage" and "reserve tonnage." 7 C.F.R. 989.65. The handler pays producers for the free tonnage at market prices and may resell those raisins without restriction. *Ibid.*; *Lion Raisins, Inc*, 416 F.3d at 1360; J.A. 296.

Producers do not receive immediate direct payment for the reserve tonnage. *Lion Raisins, Inc.*, 416 F.3d at 1360. The handler must hold those raisins "for the account of the [RAC]." 7 C.F.R. 989.66(a); *Lion Raisins, Inc.*, 416 F.3d at 1360; J.A. 296. The RAC can dispose of the reserve raisins in a variety of ways not expected to undermine domestic market prices for free-tonnage raisins, such as by export or sale in "secondary, noncommercial" markets like school-lunch programs. *Lion Raisins, Inc.*, 416 F.3d at 1359-1360; see 7 C.F.R. 989.67; J.A. 296. The RAC uses the proceeds from the sale of reserve raisins to pay the costs of administering the reserve pool and to promote the sale of raisins domestically and abroad, with surplus proceeds distributed to producers on a pro rata basis. J.A. 296; 7 U.S.C. 608c(6)(E); 7 C.F.R. 989.53(a), 989.66(h). Thus, a producer's overall compensation for its raisin crop will be determined by the market price for free-tonnage raisins plus any additional surplus proceeds from reserve-tonnage raisins.

In some years, for example in the 1998-1999, 2004-2005, 2010-2011, and 2011-2012 crop years, there was no reserve raisin pool at all, so all raisins were free tonnage that could be sold at market prices. See RAC, *Marketing Policy & Industry Statistics: 2012-2013 Marketing*

Season 28.[5] In the 2002-2003 and 2003-2004 crop years at issue in this case, the Secretary required reserves of 47% and 30% respectively. *Ibid.*

In the 2002-2003 crop year, a producer received $27.45 per ton as its equitable share of the remaining proceeds after the RAC disposed of the raisin reserve pool. See RAC, *Minutes of the Meeting* 3 (Apr. 12, 2007). No payments were made for the 2003-2004 crop year because no surplus from the sale of reserve raisins remained after the RAC met its expenses and funded export-promotion activities. See RAC, *Memo to All 2003-2004 Natural (sun-dried) Seedless Growers regarding 2003-2004 Natural (sun-dried) Seedless Reserve Pool* 1 (June 23, 2008).

The raisin marketing order requires handlers to file certain reports with the RAC, such as reports concerning the quantity of raisins they hold or acquire. 7 C.F.R. 989.73. The order additionally requires handlers to allow the RAC access to their premises, raisins, and business records to verify the accuracy of the handlers' reports. 7 C.F.R. 989.77. The order also requires handlers to obtain inspections of raisins acquired, 7 C.F.R. 989.58(d), and to pay certain assessments, 7 C.F.R. 989.80, which help pay the RAC's administrative costs, J.A. 122.

A handler that violates any provision of the marketing order or its implementing regulations is subject to a civil penalty of up to $1100 per day of violation. 7 U.S.C. 608c(14)(B); 7 C.F.R. 3.91(b)(1)(vii); see J.A. 106-107 & n.2. In addition, a handler that does not comply with the

---

[5] See http://www.raisins.org/images/marketing_policy_2012.pdf (Oct. 3, 2012). When there is no reserve pool, the RAC funds its operations entirely through assessments on handlers. See 76 Fed. Reg. 18,003, 18,004 (Apr. 1, 2011).

reserve requirement "shall compensate the [RAC] for the amount of the loss resulting from his failure to so deliver" reserve raisins when requested by the RAC. 7 C.F.R. 989.166(c).

3. Petitioners own and operate vineyards in California where, since 1969, they have grown grapes and produced raisins. J.A. 297. For six years, petitioner Marvin D. Horne served as a member or alternate member of the RAC. J.A. 28. As raisin growers, petitioner Horne and his family do business under the name "Raisin Valley Farms," which is also a petitioner in this Court. J.A. 297.

For more than 30 years, petitioners operated only as raisin producers. But after petitioners informed USDA in 2001 that they planned to pack and market their own raisins, USDA informed petitioners that

> based upon your description of your proposed activities, you would be considered a handler under the Federal marketing order for California raisins (order). As a handler, you would be required to meet all of the order's regulations regarding volume control, quality control (which includes incoming and outgoing inspection), assessments, and reporting to [the RAC].

J.A. 58, 152. On April 23, 2002, petitioners notified the Secretary that they were, under protest, registering as a handler under the raisin marketing order, and they agreed to comply with the order's reserve provisions. J.A. 29.

In a May 20, 2002 letter, USDA repeated its admonition to petitioners, stating that "[y]ou indicate in your correspondence that you plan to pack and market your own raisins. Such activities would make you a handler

under the order. As a handler, you would be required to meet all of the order's regulations." J.A. 152-153.

Petitioners purchased equipment to clean, stem, sort, and package raisins, and proceeded to operate their own packing and handling operation, doing business under the name "Lassen Vineyards." J.A. 124. (Lassen Vineyards is separately named as a petitioner in this Court.) Lassen Vineyards not only packed the raisins petitioners produced in their Raisin Valley Farms operation, but also packed, for a fee, raisins produced by more than 60 other farmers. J.A. 30, 298.[6] All told, petitioners' facilities processed more than three million pounds of raisins during the 2002-2003 and 2003-2004 crop years. J.A. 127, 298. During the 2002-2003 crop year, only 27.4% of those raisins were produced by petitioners; the remaining 72.6% belonged to other producers.[7] During the portion of the 2003-2004 crop year at issue here, petitioners produced only 12.3% of the raisins they handled; the remaining 87.7% were owned by other producers.[8]

---

[6] Petitioners typically charged producers 12 cents per pound to pack their raisins and five dollars for the use of each pallet for stacking boxed raisins. J.A. 31, 56, 125.

[7] These figures were calculated by (1) adding the total weight of natural seedless raisins handled by petitioners and produced by Raisin Valley Farms (276,544 pounds); Don and Rena Durbahn, whose estates are petitioners in this Court (67,980 pounds); and Lassen Vineyards (3180), see A.R. 745-748, and then (2) dividing the resulting figure (347,704 pounds) into the total weight of natural seedless grapes handled by petitioners for all producers (1,266,924 pounds), see A.R. 748.

[8] To calculate this figure, the government used outgoing inspection certificates, A.R. 2186-2287, and reports, A.R. 2290-2304, to sum weight by lot number, and the charts at A.R. 2593-2595 to correlate lot numbers to specific producers. Of the 1,965,650 pounds of raisins

Although petitioners had "requested and received" advice from USDA about their status as handlers, they "expressly disregarded" it. J.A. 30. During the 2002-2003 and 2003-2004 crop years, petitioners repeatedly failed to pay any assessments to the RAC, to have inspection of incoming raisins performed, to allow USDA access to their records (despite being served by the agency with two subpoenas), and to hold raisins in reserve. J.A. 35-36. Petitioners also filed inaccurate reports incorrectly claiming that they had not acquired, shipped, or disposed of any raisins during the relevant time periods. J.A. 33-34. Petitioners' Lassen Vineyards handling operation not only failed to reserve petitioners' own raisins produced by their Raisin Valley Farms operation, but it also failed to reserve any of the raisins produced and owned by the more than 60 other farmers who contracted with Lassen Vineyards for handling services. J.A. 298.

During this period, USDA continued to inform petitioners that, as handlers, they were subject to the requirements of the raisin marketing order even with respect to the raisins they produced:

---

handled by petitioners during the relevant portion of the 2003-2004 crop year (J.A. 85), lots representing 59,850 pounds were exclusively attributed to Marvin Horne on these inspection sheets. Lots with an additional 84,270 pounds were attributed simultaneously to Raisin Valley Farms or Lassen Vineyards and other (non-petitioner) producers. For purposes of this calculation, the government nonetheless attributed those raisins entirely to petitioners. There were additional raisins (totaling 98,015 pounds) without lot numbers noted or whose only lot numbers could not be correlated with a producer. The government attributed all those raisins to petitioners as well. Given these conservative assumptions, the resulting calculation—(59,850 + 84,270 + 98,015)/1,965,650)—likely overstates the proportion of raisins produced by petitioners.

> You are not the only handler who handles raisins of his own production. More than half of the recognized handlers on the RAC Raisin Packer list are also producers of raisins. These handlers have raisins of their own production brought to their plant; they have them inspected; they acquire those raisins and report them to the RAC; they set aside a portion of raisins of their own production as reserve * * *. Those packers do this for their own produced raisins, just as they do for any other growers that deliver raisins to their packing facility.

A.R. 2444; see J.A. 153 ("You state that 'handler producer' raisins are not acquired and therefore are not subject to the order's reserve requirements. This is not accurate.").

4. In 2004, the Administrator of the Agricultural Marketing Service (a division of USDA) initiated a disciplinary proceeding against petitioners, alleging that they had violated various provisions of the raisin marketing order and implementing regulations during the 2002-2003 and 2003-2004 crop years. J.A. 127-128, 299. An administrative law judge (ALJ) held a three-day hearing. J.A. 128. In the administrative proceedings, petitioners admitted that during the 2002-2003 and 2003-2004 crop years, they did not pay assessments to the RAC; they did not have incoming inspections performed; they did not report acquisitions of raisins; and they did not hold raisins in reserve. J.A. 126-127.

The ALJ rejected petitioners' contention that they were not handlers of their own raisins because they did not "acquire" them within the meaning of the relevant regulation, pointing out that the term means, among other things, "to have or obtain physical possession." J.A. 41-45 (quoting 7 C.F.R. 989.17) (emphasis omitted).

The ALJ also rejected petitioners' "patently specious argument" that the Farmer-to-Consumer Direct Marketing Act of 1976, 7 U.S.C. 3001-3006, exempted them from their handler obligations. J.A. 45-46. He pointed out that the 1976 statute nowhere mentioned the AMAA and also explained that the statute sought to promote direct sales from farmers to consumers, while petitioners were in fact "marketing raisins to candy makers and food processors as ingredients." J.A. 46.

The ALJ found that petitioners committed 673 violations of the raisin marketing order:

> 20 violations for submitting inaccurate reports to the RAC, see 7 C.F.R. 989.73(a), (b), and (d);
>
> 58 violations for failure to obtain incoming inspections of raisins during the 2002-2003 and 2003-2004 crop years; see 7 C.F.R. 989.58(d);[9]
>
> two violations for failure to pay required assessments to the RAC, see 7 C.F.R. 989.80;
>
> one violation for failing to allow USDA access to their records, see 7 C.F.R. 989.77; and
>
> 592 violations (one per day) for failure to reserve required raisins for 294 days during the 2002-2003 crop year and failure to reserve required raisins for 298 days during the 2003-2004 crop year, see 7 C.F.R. 989.66, 989.166.

J.A. 36-38, 299.

The ALJ also found that petitioners "acted willfully and intentionally," J.A. 45; that "their violations were deliberate," J.A. 27; and that their violations "were

---

[9] The ALJ appears to have originally found 53 inspection violations, which the judicial officer later corrected to 58 violations. Compare J.A. 37 with J.A. 91.

designed to obtain an unfair competitive advantage over other California raisin handlers who were in compliance with the Raisin Order," *ibid.* See J.A. 41, 80, 91, 169; see also J.A. 45 (Petitioners "play[ed] a kind of shell game with interlocking partnerships and a marketing association to try to conceal their role as first handler.").

The ALJ's decision was affirmed in relevant part by a USDA judicial officer. See J.A. 50-94; see also J.A. 95-118 (judicial officer decision granting petition to reconsider).

Accordingly, petitioners were ordered to pay:

> $8,783.39 in assessments that petitioners had failed to pay to the RAC for the 2002-2003 and 2003-2004 crop years, see J.A. 299;
>
> $483,843.53 for the raisins petitioners had failed to reserve in the 2002-2003 and 2003-2004 crop years, see J.A. 299; and
>
> $202,600 in civil penalties, see J.A. 299.[10]

5. Petitioners sought judicial review of the agency's decision in the United States District Court for the Eastern District of California. J.A. 132, 300; see 7 U.S.C. 608c(14)(B). The district court granted summary judgment in favor of the government. J.A. 120. It concluded that petitioners met the regulatory definition of raisin handlers, 7 C.F.R. 989.15, because "substantial

---

[10] The ALJ originally ordered petitioners to pay $1100 for each of the 592 days in which they failed to reserve raisins as required by the marketing order ($651,200), plus an additional $1100 for each of 73 violations in submitting inaccurate reports and failing to obtain inspections ($80,300), for total civil penalties of $731,500. J.A. 48. The judicial officer reduced the civil penalty to $300 per violation for a total of $202,600. J.A. 92.

evidence demonstrates that [petitioners] engaged in stemming, sorting, cleaning, seeding, grading, or packaging of raisins within California," J.A. 137; see J.A. 74-79, 112-116 (same conclusion by judicial officer), 41-45 (ALJ). The court found that the various monetary orders imposed on petitioners did not violate the Eighth Amendment because they were either remedial provisions rather than fines, J.A. 160-163, or were not excessive, J.A. 163-170. The court further concluded that "the transfer of title to the reserve tonnage does not constitute a physical taking." J.A. 178 (emphasis omitted).

6. The court of appeals affirmed. J.A. 186-214. It agreed with the district court that petitioners were handlers under the relevant regulation, J.A. 198, and also rejected petitioners' Eighth Amendment challenge to the agency's order. J.A. 210-213.

In its initial opinion, the court of appeals likewise agreed with the district court that petitioners' takings claim lacked merit. J.A. 199-209. The court observed that petitioners' argument was limited to an allegation that the "'direct appropriation' of their reserve-tonnage raisins * * * is a classic *physical* taking," J.A. 202, and concluded that petitioners had "suffered no compensable *physical* taking of any portion of their crops." J.A. 209. The court explained that the reserve-pool requirement does not constitute a "direct appropriation" or "forced seizure" of petitioners' raisins, but instead merely "impose[s] a condition on [petitioners'] *use* of their crops by regulating their sale." J.A. 203-204. The requirement applies only to those who (like petitioners) "voluntarily choose to send their raisins into the stream of interstate commerce," and thereby benefit from the price support of the regulatory program. J.A. 203.

The court of appeals also explained that, while the Fifth Amendment "protects real and personal property alike," those different types of property require different analyses. J.A. 207 (citing *Lucas* v. *South Carolina Coastal Council*, 505 U.S. 1003, 1027-1030 (1992)). The court explained that "[w]hereas a regulation depriving a landowner of '*all* economically beneficial uses' of his land effects a categorical taking, the same may not necessarily be true of a regulation banning the sale of a commercial product." *Ibid.* (quoting *Lucas*, 505 U.S. at 1019). The reserve requirement applies to personal, not real, property, the court continued, and it limits only the "right to sell [petitioners'] raisins," which implicates at most "one 'strand' in [petitioners'] bundle" of property rights. J.A. 208.

The court of appeals also explained that petitioners' exclusive focus on reserve-tonnage raisins "ignore[d] [this] Court's repeated admonition that we must consider the regulation's impact on 'the parcel as a whole' rather than 'divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated.'" J.A. 208 (quoting *Penn Cent. Transp. Co.* v. *New York City*, 438 U.S. 104, 130-131 & n.27 (1978)). In this case, the court explained, "the relevant parcel * * * is the entirety of [petitioner's] annual crop." J.A. 209. Reserve raisins are only a portion of that crop, and "the reserve-pool restrictions on the market supply of raisins serve to *raise* prices for [petitioners'] free-tonnage raisins, ostensibly making their business *more* profitable than it would be in an unregulated free market." *Ibid.*

7. The court of appeals denied rehearing en banc, but the panel issued an amended opinion. J.A. 289-311. Agreeing with an argument made by the government for

the first time in its opposition to petitioners' rehearing petition, see J.A. 240-242, the court in its amended opinion omitted any discussion of the merits of petitioners' takings claim, concluding instead that the court lacked jurisdiction to address that claim. J.A. 302-306.

The court of appeals explained that the constitutional requirement to provide just compensation for a taking is satisfied so long as the government "provide[s] an adequate process" for obtaining such compensation. J.A. 303 (citation and internal quotation mark omitted). The court explained that, with respect to the federal government, such process is provided by the Tucker Act, 28 U.S.C. 1491(a)(1), which permits a person to bring an action in the Court of Federal Claims seeking monetary compensation for government actions alleged to be takings under the Fifth Amendment. J.A. 304. Accordingly, the court reasoned, "a takings claim against the federal government must be brought" under the Tucker Act "in the first instance, 'unless Congress has withdrawn the Tucker Act grant of jurisdiction in the relevant statute.'" *Ibid.* (quoting *Eastern Enterprises* v. *Apfel*, 524 U.S. 498, 520 (1998) (plurality opinion)).

The court of appeals determined that the relevant statute here—the AMAA—did not withdraw Tucker Act jurisdiction over petitioners' takings claim. J.A. 304-305. The court explained that, if petitioners were bringing a Just Compensation Clause claim in their capacity as raisin *handlers*, then the AMAA would preclude a Tucker Act action, because the AMAA itself provides the exclusive mechanism for administrative and judicial review of a challenge by a handler to a marketing order. *Ibid.*; see 7 U.S.C. 608c(15)(A). But the court observed that petitioners had brought their Just Compensation Clause claim "not in their capacity as handlers but in

their capacity as producers," because they had "alleg[d] that the regulatory scheme at issue takes reserve-tonnage raisins belonging to producers, not property belonging to handlers." J.A. 305. "Nothing in the AMAA," the court concluded, "precludes [petitioners] from alleging in the Court of Federal Claims that the reserve program injures them in their capacity as producers," and petitioners were therefore required to seek just compensation in that forum. J.A. 306.

SUMMARY OF ARGUMENT

The court of appeals correctly held that it could not adjudicate petitioners' Just Compensation Clause claim in the context of this proceeding.

A. The Just Compensation Clause "does not proscribe the taking of property" generally, but only such a taking "without just compensation." *Williamson County Reg'l Planning Comm'n* v. *Hamilton Bank*, 473 U.S. 172, 194 (1985). Thus, when the government offers a procedure for obtaining after-the-fact compensation, a property owner must utilize that procedure rather than seek an injunction on the ground that the government action constitutes a taking *without* just compensation. Congress has provided such a procedure in the Tucker Act, which authorizes the Court of Federal Claims to award compensation against the federal government when the court finds that a taking has occurred.

B. The AMAA regulates handlers, not producers, and subjects handlers, not producers, to penalties for not complying with its regulatory requirements. See 7 U.S.C. 608c(13)(B) and (14)(B). The statute then gives only handlers an avenue for judicial review of such penalties. See 7 U.S.C. 608c(14)(B). The government agrees that this dedicated judicial-review provision would supplant Tucker Act jurisdiction for a takings

claim asserted by a handler in its capacity as a handler. But this is not such a case.

Petitioners allege that the reserve requirement unlawfully takes raisins they produced without just compensation. They have standing to raise that claim only in their capacity as producers who own those raisins allegedly taken. Yet the payment order they challenge here was imposed on petitioners only as handlers. To be sure, petitioners acted as both producers and handlers, but they cannot manufacture standing or a right of action under 7 U.S.C. 608c(14) for themselves—and give themselves avenues for judicial review not available to other producers—by engaging in a producer-handler "shell game" (J.A. 45).

C. Petitioners offer several theories in support of their contention that the court of appeals should have resolved their Just Compensation Clause claim. None succeed.

1. Relying on the plurality opinion in *Eastern Enterprises* v. *Apfel*, 524 U.S. 498 (1998), petitioners posit that when the alleged taking is the compelled transfer of money, the challenge to it need not be asserted in the Court of Federal Claims. They further contend that this is such a case because the Department of Agriculture ordered them to pay money for their myriad regulatory violations. Petitioners, however, litigated this case below as one involving the alleged physical taking of raisins, not money—and for good reason. This Court has never held that a requirement to pay money from unidentified sources can be challenged as a physical taking.

To the extent petitioners seek to challenge the USDA payment order not in its own right but because of its connection to raisins they produced (and refused to reserve), that is a producer claim, and, as described

above, it may not properly be asserted in this handler action. In any event, petitioners' analogy to *Eastern Enterprises* does not hold. The payment obligations imposed on them by the USDA were not the dollar-for-dollar equivalent of the just compensation they would have received if, hypothetically, they had complied with the reserve requirement and then successfully contended in a Tucker Act suit that the requirement resulted in a taking of the raisins they produced. Most of the raisins petitioners failed to reserve were produced by others, and petitioners would have no takings claim based on those raisins (or on the remedial payment obligation imposed for failure to reserve them).

Moreover, a proper just compensation inquiry would involve complex valuation questions that would defeat any claim for "dollar-for-dollar" reimbursement. For example, any compensation due petitioners would be reduced by the benefits they received from the raisin marketing order and its reserve requirement, such as higher prices for the raisins they sold legally. Such offsets might overall reduce any compensation owed petitioners to zero.

2. Petitioners' contention that they may assert a takings claim as a "defense" to this enforcement action fails. Even assuming *arguendo* that such a defense might be available in other circumstances, it is not available here, where the takings claim may be asserted only by producers but the enforcement action is brought only against handlers.

In any event, petitioners are incorrect that the very same takings claim that could not support an injunction (because the property owner had failed to seek compensation under available procedures) could support a "defense" to an enforcement action. In both settings the

defect in the claim is the same: there has been no constitutional violation if the property owner has not sought just compensation for the alleged taking through available procedures.

3. This case provides no occasion for the Court to decide whether the Congress that enacted the AMAA would not have wanted to pay compensation if a taking were found, thus making an injunction available in place of monetary compensation under the Tucker Act. Petitioners did not make that argument below. Moreover, even if a takings-based injunction were available to a producer, that does not mean that petitioners could assert that claim as a defense to an enforcement action brought against them as handlers.

In any event, petitioners' characterization of congressional intent is incorrect. It is true that the AMAA was intended to order economic relations among private parties and to stabilize the agricultural markets without expenditure of federal funds. The structure of the statute as a whole, however, nonetheless suggests that Congress would not have preferred an injunction in district court to an action for compensation under the Tucker Act. Congress intended the AMAA to benefit producers by increasing overall prices for their products, and there is thus no firm basis to conclude that Congress would have expected any taking to be found, or to result in an order to pay compensation. Moreover, Congress built considerable administrative flexibility into the statute, and likely would have preferred use of that flexibility in response to any order to pay compensation for a taking over an injunction against operation of the statute or its implementing regulations.

ARGUMENT

PETITIONERS' JUST COMPENSATION CLAIM CANNOT BE BROUGHT IN THIS ACTION UNDER 7 U.S.C. 608C(14) FOR JUDICIAL REVIEW OF A USDA ORDER ENTERED AGAINST PETITIONERS AS HANDLERS

The Fifth Amendment's Just Compensation Clause provides that "private property [shall not] be taken for public use, without just compensation." U.S. Const. Amend. V. As its plain language indicates, the Just Compensation Clause "does not proscribe the taking of property," but instead only "proscribes taking *without just compensation.*" *Williamson County Reg'l Planning Comm'n* v. *Hamilton Bank*, 473 U.S. 172, 194 (1985) (*Williamson County*) (emphasis added); see *Brown* v. *Legal Found. of Washington*, 538 U.S. 216, 235 (2003); *First English Evangelical Lutheran Church* v. *County of L.A.*, 482 U.S. 304, 314-315 (1987). As a general matter, Congress has designated the Court of Federal Claims under the Tucker Act, 28 U.S.C. 1491(a)(1), as the exclusive venue for seeking just compensation for an alleged taking. Petitioners have not pursued compensation under the Tucker Act for their claim as raisin producers, and the court of appeals correctly concluded that it could not consider that claim in the context of this proceeding seeking review of sanctions imposed on petitioners only as handlers.

A. Property Owners Have No Just Compensation Claim Against The Federal Government If Compensation May Be Obtained Under The Tucker Act

1. Just compensation need not "be paid in advance of, or contemporaneously with, the taking; all that is required is that a 'reasonable, certain and adequate provision for obtaining compensation' exist at the time of the

taking." *Williamson County*, 473 U.S. at 194 (quotir *Regional Rail Reorganization Act Cases*, 419 U.S. 10 124-125 (1974) (*Regional Rail*)). Accordingly, "the Ju Compensation Clause has never been held to requi pretaking process or compensation. Nor has the Cou ever recognized any interest served by pretaking cor pensation that could not be equally well served by pos taking compensation." *Id.* at 196 n.14 (internal citatic omitted).

When the government has provided such a procedu to pay compensation, "the property owner cannot clai a violation of the Just Compensation Clause until it h: used the procedure and been denied just compensation *Williamson County*, 473 U.S. at 195; see *id.* at 194-1! (noting that if resort to adequate process yields ju compensation "then the property owner has no clai against the Government") (citation and internal quot tion marks omitted); *Larson* v. *Domestic & Foreig Commerce Corp.*, 337 U.S. 682, 697 n.18 (1949) ("[T]l availability of a suit for compensation against the sove eign will defeat a contention that the action is unconst tutional as a violation of the Fifth Amendment."). F this reason, "an alleged taking is not unconstitution unless just compensation is unavailable." *Hodel* v. *Vi ginia Surface Mining & Reclamation Ass'n, Inc.*, 4! U.S. 264, 297 & n.40 (1981).

2. With respect to the federal government, the Tuc er Act, 28 U.S.C. 1491(a)(1), constitutes the requisi reasonable, certain, and adequate provision for obtai ing just compensation that a property owner must pu sue. The Tucker Act generally permits a plaintiff wl believes that the government has taken his proper without just compensation to bring an action against tl United States for compensation in the Court of Feder

Claims. *Ibid.*; see *Ruckelshaus* v. *Monsanto Co.*, 467 U.S. 986, 1016-1017 (1984); see also 28 U.S.C. 1346(a)(2) (Supp. V 2011) (providing concurrent jurisdiction in the district courts for claims not exceeding $10,000). Thus, the Tucker Act generally stands as an "implied[] promise[] [by the federal government] to pay that compensation" due if its actions constitute the taking of property under the Fifth Amendment. *Yearsley* v. *W.A. Ross Constr. Co.*, 309 U.S. 18, 21 (1940); see *Preseault* v. *ICC*, 494 U.S. 1, 11 (1990).[11]

This Court has therefore recognized that, as a general matter, "taking claims against the Federal Government are premature until the property owner has availed itself of the process provided by the Tucker Act." *Williamson County*, 473 U.S. at 195; see, *e.g.*, *Eastern Enterprises* v. *Apfel*, 524 U.S. 498, 521 (1998) (plurality opinion) ("[T]he availability of a Tucker Act remedy renders premature any takings claim in federal district court."); *Preseault*, 494 U.S. at 17 ("[P]etitioners' failure to make use of the available Tucker Act remedy renders their takings challenge to the ICC's order premature."); *Monsanto Co.*, 467 U.S. at 1019 ("Because we hold that the Tucker Act is available as a remedy for any uncompensated taking Monsanto may suffer as a result of the operation of the challenged provisions of [the statute], we conclude that Monsanto's

---

[11] To the extent petitioners suggest (Br. 36-37) that the Tucker Act monetary remedy is available only where the government concedes that a taking of property has occurred, they are mistaken. *Regional Rail*, 419 U.S. at 149 n.36 ("[T]he fact that Congress did not contemplate a taking does not pretermit a Tucker Act remedy.").

challenges to the constitutionality of the * * * schen are not ripe for our resolution.").[12]

Although these decisions have stated that a takin challenge is "premature" or "not ripe" if compensati for the alleged taking is available under the Tucker A that does not mean that proceedings would lie in distri court at a later date if the person alleging a taking d not succeed on the merits in the Tucker Act suit. Thu if the Court of Federal Claims holds that the feder action at issue did not constitute a taking, or awards le compensation for a taking than was sought, that jud ment resolving the takings claim would be binding a subject to review only on appeal to the Federal Circu followed by a certiorari petition in this Court. Compa *San Remo Hotel, L.P.* v. *City & County of S.F.*, 545 U. 323, 346-347 (2005) (barring relitigation in federal cou of takings claim resolved in state court). Only if t courts in the Tucker Act proceeding were to conclu that compensation is not available even if the particul federal action did constitute a taking, see, *e.g.*, pp. 25-2 50, *infra*, would a suit then lie in district court.

The correct path for petitioners to challenge the r sin marketing order's reserve requirement as a physi taking of the raisins petitioners produced thus was cle and well marked. Petitioners should have complied w

---

[12] This conclusion is consistent with the proposition that wh a remedy at law is available—namely, monetary compensation un the Tucker Act—injunctive relief to prevent an alleged takin unavailable. See *Monsanto Co.*, 467 U.S. at 1016 ("Equitable relie not available to enjoin an alleged taking of private property fo public use, duly authorized by law, when a suit for compensation be brought against the sovereign subsequent to the taking.") (fo note omitted).

the order's requirements, and, after a portion of their raisins were placed in reserve to be disposed of as directed by the RAC, petitioners could have sought compensation as producers in the Court of Federal Claims for the alleged taking. See *Evans* v. *United States*, 74 Fed. Cl. 554, 562-565 (2006) (considering—and rejecting—such a claim), aff'd, 250 Fed. Appx. 321 (Fed. Cir. 2007), cert. denied, 552 U.S. 1187 (2008); see also *Cal-Almond, Inc.* v. *United States*, 30 Fed. Cl. 244, 246-247 (1994) (rejecting claim for compensation based on reserve requirement under almond marketing order), aff'd, 73 F.3d 381 (Fed. Cir. 1995) (Table), cert. denied, 519 U.S. 963 (1996); see also *United States* v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121, 129 n.6 (1985) (observing that, in order to assert takings claim, party's "proper course is not to resist [agency's statutory interpretation in enforcement action], but to initiate a suit for compensation in the Claims Court"). Petitioners failed to pursue such an action. In any event, as explained below, the lower courts could not adjudicate petitioners' just compensation claim as producers in the context of an action for judicial review of an order imposing sanctions on them in their separate capacity as handlers.

B. Petitioners May Not Assert Producer Claims In An AMAA Handler Proceeding

Petitioners (Br. 47-55) and the United States both agree that the AMAA withdraws Tucker Act jurisdiction for claims brought by *handlers* as handlers. As the court of appeals recognized (J.A. 304-305), the AMAA contains its own exclusive provisions for administrative and judicial review of a legal challenge to a marketing order, or to an implementing regulation or requirement, by "[a]ny handler subject to" that order. 7 U.S.C. 608c(15)(A). The AMAA likewise contains the exclusive

review provisions for sanctions orders imposed on handlers, 7 U.S.C. 608c(14)(B). See, *e.g.*, *United States* v. *Erika, Inc.*, 456 U.S. 201, 208 (1982) (noting that Congress's creation of a comprehensive statutory scheme for judicial review in a specific forum will ordinarily be understood to withdraw jurisdiction of the Court of Federal Claims under the Tucker Act); see also *United States* v. *Bormes*, 133 S. Ct. 12, 18 (2012).[13] Accordingly, a takings claim by a handler brought in its capacity as a handler can only be asserted through the judicial review procedures established by the AMAA. See *Lion Raisins, Inc.* v. *United States*, 416 F.3d 1356, 1370-1373 (Fed. Cir. 2005).

But those review procedures are unavailable for claims asserted by *producers*. Compare 7 U.S.C. 608c(14)(B) ("Any *handler* subject to [a marketing] order, or any officer, director, agent, or employee of such *handler*," is subject to civil penalties, and an order for such penalties is judicially reviewable in any district "in which the *handler* subject to the order is an inhabitant or has the *handler*'s principal place of business") with 7 U.S.C. 608c(13)(B) ("No order issued under this chapter shall be applicable to any producer in his capaci-

---

[13] Congress has likewise provided for exclusive review of orders of the Federal Communications Commission in the courts of appeals, see 47 U.S.C. 402 (2006 & Supp. V 2011); *FCC* v. *ITT World Commc'ns, Inc.*, 466 U.S. 463, 468 (1984), thus displacing jurisdiction under the Tucker Act. See *Biltmore Forest Broad. FM, Inc.* v. *United States*, 555 F.3d 1375, 1380-1384 (Fed. Cir.), cert. denied, 558 U.S. 990 (2009); *Folden* v. *United States*, 379 F.3d 1344, 1355-1358 (Fed. Cir. 2004), cert. denied, 545 U.S. 1127 (2005). It is therefore not surprising that the Court considered the takings claim on the merits in *FCC* v. *Florida Power Corp.*, 480 U.S. 245 (1987), in which a party used the exclusive judicial review mechanism in 47 U.S.C. 402 to challenge an FCC order. Cf. Pet. Br. 25.

ty as a producer."). And here, petitioners' Just Compensation Clause claim is brought "in [their] capacity" (7 U.S.C. 608c(13)(B)) as producers, not as handlers.

Petitioners allege that the reserve requirement unlawfully took a portion of the raisins they produced without just compensation. They have standing to raise that claim only in their capacity as producers who own those particular raisins. A raisin handler who produces no raisins and simply handles the raisins that are property of another would have no standing and no right of action under 7 U.S.C. 608c(14)(B) to contend that the reserve requirements unlawfully takes a separate producer's property. So too with petitioners.

Plainly, petitioners do not have standing in any court to contend that the government has taken the raisins owned by the more than 60 other farmers with whom petitioners contracted to provide handling services. If petitioners have standing to assert a claim under the Just Compensation Clause, it is only because *some* of the raisins they handled are raisins that they themselves produced, grew, or owned. But that means that they have standing only in their capacity *as producers*, for raisins that they own, and thus their Just Compensation claim could be brought only in their capacity as producers. Such a claim cannot be brought in a suit for judicial review of a USDA decision under 7 U.S.C. 608c(14); that avenue for judicial relief is available only to *handlers*, because only handlers can be subject to penalties and other monetary assessments for violating a marketing order.

For this reason alone, the court of appeals properly concluded that petitioners' takings claim was not cognizable in this suit. This distinction is not "doubletalk," as petitioners contend (Br. 51), but simply recognition

that, under this particulars regulatory scheme, handle
have no property interest in (and never take title to) t
reserve raisins they handle, and therefore have
standing or right of action to assert that those raisi
have been taken from them without just compensati

Petitioners seek to avoid that result by contendi
(Br. 52) that because they happen to be both produce
and handlers, their claims fall within the AMAA's revi
provision for claims by "[a]ny handler." 7 U.S
608c(15)(A). But the AMAA expressly recognizes tha
single entity may function in several capacities, se
U.S.C. 608c(13)(B) (providing that no marketing orc
"shall be applicable to any producer in his capacity a
producer"); see also 7 U.S.C. 608c(13)(A) (recognizi
similar exemption for one operating "in his capacity a
retailer"), and nowhere dictates that an entity m
always be considered a producer or a handler for all p
poses. Thus, other courts of appeals, like the court
appeals in this case, have held that an entity that is b
a producer and a handler under the AMAA may bri
claims in either capacity depending on the nature of
claim presented, and the review provisions under
AMAA may or may not apply depending on the capac
under which the claim is brought. See *Arkansas Da
Coop. Ass'n* v. *USDA*, 573 F.3d 815, 823 n.4 (D.C. C
2009), cert. denied, 558 U.S. 1133 (2010); *Hettinga
United States*, 560 F.3d 498, 503-504 (D.C. Cir. 20
cert. denied, No. 12-506 (Jan. 7, 2013); *Edaleen Dai
LLC* v. *Johanns*, 467 F.3d 778, 783 (D.C. Cir. 20
Dairylea Coop., Inc. v. *Butz*, 504 F.2d 80, 83 (2d C
1974).[14]

---

[14] Petitioners have contended that these decisions, which inv
milk regulation, are inapposite because the "AMAA and its accon
nying *milk* regulations expressly create a separate category for

C. Petitioners' Various Contentions For Establishing Jurisdiction Lack Merit

Petitioners advance several arguments for why the court of appeals nevertheless could adjudicate their just compensation claim in this action under 7 U.S.C. 608c(14) for judicial review of USDA's decision finding violations by petitioners in their capacity as handlers. All are incorrect.

1. Any exception to the Tucker Act for a "direct transfer of funds" has no application here

Petitioners observe that, under the reasoning of the plurality opinion in *Eastern Enterprises*, 524 U.S. at 521, if an alleged taking requires the direct transfer of funds, the appropriate recourse is an injunction in federal district court rather than monetary compensation in the Court of Federal Claims. Petitioners contend that their challenge to USDA's order that they pay monetary remedies and sanctions for their non-compliance with the raisin marketing order is such a case. See Pet. Br. 17-22. This contention fails for several reasons.

a. Petitioners are correct that a plurality of this Court in *Eastern Enterprises* concluded that the plaintiff in that case could obtain injunctive relief against an alleged taking based on a "direct transfer of funds mandated by the Government." 524 U.S. at 521. That case concerned the Coal Industry Retiree Health Benefits Act of 1992 (Coal Act), 26 U.S.C. 9701 *et seq.*, in which

---

'producer-handlers.'" Pet. 31 (quoting 7 U.S.C. 608c(5)). In fact, the AMAA generally contemplates that entities may operate as producer-handlers; that is why it specifies that no marketing order "shall be applicable to any producer in his capacity as a producer." 7 U.S.C. 608c(13)(B); see *Lion Raisins, Inc.*, 416 F.3d at 1368-1373 (distinguishing between claims asserted by a single entity in its capacity as raisin producer and those asserted in its capacity as raisin handler).

Congress provided for the funding of medical expens for retired miners and their dependents. The progra was financed by premiums, assigned by the Commi sioner of Social Security, to be paid by current and fo mer coal operators according to a statutory formul *Eastern Enterprises*, 524 U.S. at 514-515. Althou Eastern Enterprises had left the coal industry in 19€ the government required the company to pay premiur totaling more than $5 million for a 12-month period. *I* at 516-517.

Eastern Enterprises brought suit in district court a serting, in part, that the Coal Act's requirement that pay premiums constituted a taking of property with the meaning of the Fifth Amendment. *Eastern Ente prises*, 524 U.S. at 517. A four-Justice plurality, befo addressing the merits of that claim, considered wheth Eastern Enterprises' takings claim should have be brought in the Court of Federal Claims in a suit f compensation under the Tucker Act, rather than federal district court in a suit for injunctive relief. *Id.* 519.

The plurality recognized that ordinarily, "a claim f just compensation under the Takings Clause must brought to the Court of Federal Claims in the first i stance." *Eastern Enterprises*, 524 U.S. at 520. But t plurality concluded that the Tucker Act was unavailat "in a case such as" that one, because "it cannot be sa that monetary relief against the Government is an ava able remedy." *Id.* at 521. The plurality reasoned, *int alia*, that "'where the challenged statute, rather th burdening real or physical property, requires a dire transfer of funds' mandated by the Government," "claim for compensation 'would entail an utterly poir less set of activities.'" *Ibid.* (citation omitted). That

if assessment of the premiums on a coal operator constituted a taking, then the just compensation due the coal operator would require the government to "compensate coal operators" for the exact amount of the premiums, and thus "[e]very dollar paid pursuant to [the] statute would be presumed to generate a dollar of Tucker Act compensation." *Ibid.* (citation omitted). Rather than require that "pointless set of activities," the plurality concluded that "the declaratory judgment and injunction sought by petitioner constitute an appropriate remedy under the circumstances, and that it is within the district courts' power to award such equitable relief." *Id.* at 522.

The other five Justices in *Eastern Enterprises* concluded that imposition of monetary liability, as distinguished from seizure of a specific fund of money, was not properly analyzed as a takings claim. 524 U.S. at 541-547 (Kennedy, J., concurring in the judgment and dissenting in part); *id.* at 554-558 (Breyer, J., dissenting). Those Justices therefore did not address the plurality's conclusion that a suit for equitable relief was a proper procedure for pressing a takings claim.

b. Even under the plurality's approach in *Eastern Enterprises*, petitioners have no basis for seeking equitable relief rather than pursing a Tucker Act claim.

i. Before USDA and the lower courts, petitioners litigated this case as a challenge to the reserve requirement as a physical "taking" of petitioners' raisins. See Br. in Opp. 10-12. That focus is understandable because a takings claim based on the novel theory that USDA had "taken" petitioners' money by ordering them to pay remedial compensation and civil penalties for regulatory violations would fail. As an initial matter, this Court has never held that *any* requirement to pay money from

unidentified sources (as opposed to, for example, th seizure of a specific account) can be the basis of a tal ings claim, see p. 31, *supra*; and if such a claim wer cognizable, it would be analyzed as a regulatory takin not a physical one. See *Eastern Enterprises*, 524 U.S. 522-524 (plurality opinion) (applying regulatory takin analysis); Gov't Amicus Br. 30-32, *Koontz* v. *St. John River Water Mgmt. Dist.*, No. 11-1447 (argued Jan. 1 2013). But here petitioners have disclaimed any regul tory takings claim. See J.A. 202, 209, 225.

Moreover, petitioners cite no authority for the pro osition that the assessment of civil penalties or entry a remedial payment order, imposed after administrati or judicial proceedings for violations of statutory regulatory requirements, could constitute a taking private property within the meaning of the Just Cor pensation Clause. Cf. *Bennis* v. *Michigan*, 516 U.S. 44 452-453 (1996) ("The government may not be required compensate an owner for property which it has alreac lawfully acquired under the exercise of government authority other than the power of eminent domain.' There are specific constitutional provisions that limit th government's authority to impose such exactions. S U.S. Const. Amend. V (Due Process Clause), Amen VIII (Excessive Fines Clause); see also J.A. 306-3 (court of appeals' rejection of petitioners' excessive fi claim). Petitioners have not explained why the Ju Compensation Clause should be interpreted to impose separate set of limitations on such remedies and san tions, or how that Clause's requirements (for exampl that a taking of private property be "for public use would apply in the context of remedial and puniti payment orders.

ii. Petitioners contend that, "were they to litigate successfully a claim for compensation in the Court of Federal Claims," they would be entitled to receive "the fair-market value" of the reserve raisins as just compensation. Pet. Br. 20. They further contend that this would be the "dollar-for-dollar" equivalent of the remedial payments and civil penalties they were ordered to pay in the proceedings before USDA, making resort to the Court of Federal Claims pointless. See *id.* at 20-21. But this argument necessarily rests on the premise that the alleged taking at issue involved the raisins themselves (even though petitioners failed to place them in reserve), rather than the monetary amounts they were ordered to pay, taking this case out of the narrow category of mandatory cash-payment statutes contemplated by the *Eastern Enterprises* plurality.

In addition, as described above, a takings claim based on petitioners' ownership of raisins would be a claim they could assert only in their capacity as raisin *producers*. That producer claim would not be cognizable in this action for judicial review of an order imposing sanctions on petitioners in their separate capacity as *handlers*. To be sure, petitioners "play[ed] a kind of shell game * * * to try to conceal their role as first handler," J.A. 45, and thus operated in both capacities. But that stratagem does not permit them to assert a claim limited to producers in a proceeding limited to handlers.

In any event, the payment obligations the USDA sanctions order imposed on petitioners are not the dollar-for-dollar equivalent of the just compensation that would have been awarded if, hypothetically, they had *complied* with the reserve requirement rather than violated it, and had then successfully invoked the Tucker Act. The plaintiff in *Eastern Enterprises* sought an

injunction to prevent application of the statute to contending that the statute would result in an uncons tutional taking of property *it* owned (money that wou be used to pay the $5 million premium). Petitioners, contrast, did not own the majority of the raisins th failed to hold aside. Petitioners failed to place into r serve not only a portion of their own raisins, but also t raisins produced and owned by the 60 other farme with whom petitioners contracted to provide handli services. See p. 9, *supra*; see also A.R. 536 (petitione acknowledgement that other producers retained "rig title, [and] ownership" of their raisins). Even if pe tioners could successfully assert a takings claim wi respect to their own raisins (despite the fact that th never placed those raisins in reserve), they could not so with respect to those belonging to other growe Petitioners likewise would not be entitled to the retu of that portion of the $483,843.53 remedial payme attributable to raisins owned by those other growers

The same flaw is present in petitioners' insisten that they would be entitled in a Tucker Act suit to dollar-for-dollar return of the civil penalty. Pet. Br. The civil penalty was imposed for petitioners' failure, a handler, to reserve the requisite percentage of raisi they held for 592 days. See J.A. 48, 91-92. For any o of those days in which petitioners failed to set asi raisins owned by someone else, petitioners could have conceivable argument that that day's civil penalty w predicated exclusively on a potential uncompensat taking of *petitioners'* property. In addition, only a p tion of the civil penalty was based on the failure to wit hold reserve raisins. J.A. 92. The remainder was bas on petitioners' violations of other requirements impos on handlers: the filing of 20 inaccurate reports, 58 fa

ures to obtain incoming inspections (which, among other things, are intended to assure that marketed raisins meet minimum quality standards, see 7 C.F.R. 989.58(d)), two failures to pay required assessments, and one failure to allow the Agricultural Marketing Service to have access to records. J.A. 91-92. Petitioners fail to explain why they would be entitled to a dollar-for-dollar just compensation payment for the portion of the civil penalty based on those independent regulatory violations.

Finally, petitioners would not be entitled to a simple dollar-for-dollar reimbursement even for the raisins they produced themselves. In *Eastern Enterprises*, the requirement to pay money was the very regulatory requirement challenged; it was not a sanction imposed as the consequence of the failure to yield another form of property. Because money has a fixed and easily ascertained value, any just compensation due for the taking of money could be readily ascertained. But when the property alleged to be taken is personal property, such as a portion of the raisins in this case, the value due as just compensation is not so readily calculated—even assuming a claim for just compensation for a physical taking would lie here at all, especially since no raisins were actually placed in reserve. That is why the *Eastern Enterprises* plurality recognized that the presumption of the availability of compensation under the Tucker Act is "reversed where the challenged statute * * * requires a direct transfer of funds," but is *not* reversed where the "challenged statute * * * burden[s] real or physical property." 524 U.S. at 521.

Any just compensation due petitioners for a taking would be measured not by the government's gain, but by the loss to petitioners. *Brown*, 538 U.S. at 236 (noting

that "the question is what has the owner lost, not wh has the taker gained") (quoting *Boston Chamber Commerce* v. *City of Boston*, 217 U.S. 189, 195 (191 (Holmes, J.)). A proper calculation of petitioners' loss (any) would necessarily take into account the entire ma keting order and regulatory program, including th gains to petitioners in the price of their free-tonnag raisins, which were higher precisely because of the ma keting order's reserve requirement. See *Regional Rai* 419 U.S. at 151 ("[C]onsideration other than cash—fo example, any special benefits to a property owner remaining properties—may be counted in the determ nation of just compensation.") (footnote omitted); *Uni ed States* v. *Rands*, 389 U.S. 121, 126 (1967) (explainir that when government takes part of a property and i actions result in an increase in market value for th remainder, just compensation owed is reduced by th increase).

Some calculation of that gain—the difference b tween actual prices and what those prices would hav been in the absence of the reserve requirement—wou be needed in order to determine the amount of any ju compensation due petitioners. See, *e.g.*, 71 Fed. Re 29,567, 29,570 (May 23, 2006) (econometric model fo 2005-2006 crop year estimated that prices for free to nage raisins were $63 per ton higher than they would h in an unregulated market). A proper just compensatio analysis would also have to account for other benefi petitioners receive from the regulatory program, such higher consumer demand for raisins spurred by e forcement of quality standards, 7 C.F.R. 989.58, ar promotional activities, 7 C.F.R. 989.53(a). Additionall in a hypothetical case seeking compensation for reser raisins, petitioners would not be entitled to the pri

they would have received had they sold those raisins—that hypothetical price would be higher than the price they would have received in the absence of the raisin marketing order and its reserve requirement.

Indeed, it is entirely likely that when all benefits and alleged losses from the reserve requirement were calculated, petitioners would have a net *gain* rather than a net loss. After all, a central point of the marketing order is to benefit producers by limiting supply and thus raising prices for their commodities. J.A. 209; *Block* v. *Community Nutrition Inst.*, 467 U.S. 340, 346 (1984). If so, then their just compensation would be zero. Cf. *Brown*, 538 U.S. at 240 & n.11 (noting that "just compensation for a net loss of zero is zero").

Furthermore, if petitioners had complied with the reserve requirement, they would have also received at least some of their equitable share of the net proceeds from the RAC's disposition of the reserve raisin pool. See p. 6, *supra*. Any amounts that petitioners received from the RAC would necessarily be deducted from any just compensation that might otherwise be due them because of the alleged taking. But petitioners, who violated the order by never holding aside any reserved raisins at all, never became entitled to receive any of the net proceeds from the RAC's disposition of the reserve pools.

Even putting all of those issues aside, just calculating the value of the raisins is not a straightforward exercise. During the administrative proceedings in this case, the judicial officer ultimately calculated the dollar equivalent of the unreserved raisins using the so-called "announced price" of raisins, rather than the "producer

price" he had previously used, J.A. 102-103.[15] While the Administrator argued that the "announced price" should be used to calculate the compensation to the RAC under the particular regulatory terms in 7 C.F.R. 989.166(c), J.A. 102, the government would remain free to argue, in a Tucker Act suit, that any just compensation due under the Fifth Amendment is not governed by the "announced price" relevant under the marketing order, but by some other methodology, such as the "producer price," which in this case would yield lower compensation. For these reasons as well, there is no reason to believe that any just compensation due petitioners (if they could somehow make out a valid takings claim) would match precisely, or even necessarily have any relation to, the amount of remedial compensation, assessments, and civil penalties petitioners were ordered to pay under the USDA order.

---

[15] The "producer prices" for these crop years was based on retrospective RAC data published in the Federal Register in 2006. See J.A. 85 (citing 71 Fed. Reg. 29,565, 29,569). The "announced prices" were those agreed to in 2003 after negotiations between producers' and handlers' bargaining associations. J.A. 102 (citing *Lion Raisins, Inc.*, 416 F.3d at 1360, and A.R. 5533-5534). Petitioners waived any objection to using the "announced price" to calculate the dollar-equivalent compensation to the RAC under 7 C.F.R. 989.166(c). See J.A. 101.

2. *Property owners may not assert the Just Compensation Clause as a "defense" to a government enforcement action where injunctive relief would be unavailable*

Petitioners ultimately agree that "[w]here the Tucker Act does create a 'reasonable, certain, and adequate' remedy at law, a private party cannot obtain affirmative injunctive relief." Pet. Br. 46-47. Petitioners contend, however, that even where injunctive relief could not be obtained in an affirmative case, a property owner can nonetheless raise the Just Compensation Clause as a *defense* to a government action, such as the proceedings brought by USDA in this case based on petitioners' repeated violations of the raisin marketing order. *Id.* at 47; see *id.* at 43. Petitioners' contention is incorrect, both in the procedural context of this case and as a general matter.

a. No takings "defense" would be permissible in this case because, as noted above, it is one seeking review of penalties and payment obligations imposed on petitioners as handlers, for their numerous violations of regulatory obligations that apply only to handlers. A takings "defense" would belong to petitioners only in a proceeding brought against them in their capacity as producers. And such a proceeding would be impermissible under the AMAA. See 7 U.S.C. 608c(13)(B) and (14)(B).

b. In any event, petitioners' broad claim of entitlement to assert a takings "defense" lacks merit. As noted above, when the federal government, through the Tucker Act, provides a procedure for obtaining monetary compensation, the property owner cannot claim a violation of the Just Compensation Clause as a result of the imposition of a regulatory requirement. *Williamson County*, 473 U.S. at 195 (explaining that a "property

owner has not suffered a violation of the Just Compe sation Clause" if he can obtain just compensati through available procedures); *Larson*, 337 U.S. at 6 n.18 (noting that availability of monetary compensati "will defeat a contention that the action is unconsti tional").

In other words, the answer to petitioners' assert "defense" is that they have never invoked the Tuck Act procedure. Accordingly, they "cannot claim a vio tion of the Just Compensation Clause," *Williams Cou ty*, 473 U.S. at 195, and they thus have no claim t anything "unconstitutional" has been done to them. S *Riverside Bayview Homes, Inc.*, 474 U.S. at 129 (defense to enforcement action "is not the proper foru for takings claim; party should instead "initiate a s for compensation in the Claims Court").

As this Court has explained, it is "[t]he nature of t constitutional right [under the Just Compensati Clause that] requires * * * a property owner [to] u lize procedures for obtaining compensation" rather th suing to enjoin government action as unconstitution *Williamson County*, 473 U.S. at 194 n.13. The Co has never "recognized any interest served by pretaki compensation that could not be equally well served post-taking compensation." *Id.* at 196 n.14.[16] That d not make the Just Compensation Clause a "poor re tion" to other constitutional provisions, Pet. Br. 46, merely recognizes that the Clause itself is not viola

---

[16] Petitioners at times suggest that the Constitution requires compensation to be paid before the government may take prope Pet. Br. 28, 32, 35, but this Court has long since rejected that a ment, *Hurley* v. *Kincaid*, 285 U.S. 95, 104-105 (1932) ("The F Amendment does not entitle him to be paid in advance of the ing.") (collecting cases).

at all unless just compensation for any taking that may occur is unavailable through established procedures. Indeed, as this Court noted in *Williamson County*, the Just Compensation Clause is not the only Clause under which a violation may occur only at a discrete, later time. See 473 U.S. at 195 (noting that sometimes the government does not "caus[e] a constitutional injury" under the Due Process Clause unless it fails to provide "an adequate *post*deprivation remedy") (emphasis added).

Because a claim under the Just Compensation Clause includes as a necessary ingredient resort to available procedures for monetary compensation, such a claim fails—whether asserted affirmatively or defensively—where such a procedure is available. In fact, a takings "defense" is no different in substance from an action by a property owner seeking an injunction to restrain the government from carrying out acts that allegedly would effectuate a taking of property.

For example, in this case, petitioners' defense effectively asks the courts to prevent USDA from imposing on petitioners any civil penalty or monetary assessment for violating the raisin marketing order's reserve requirement, on the ground that the reserve requirement amounts to an unconstitutional taking. But that is no different from a suit seeking to "obtain affirmative injunctive relief" against USDA to preclude the agency from imposing any monetary sanctions under the raisin marketing order. Pet. Br. 46-47; cf. *Virginia Office for Prot. & Advocacy* v. *Stewart*, 131 S. Ct. 1632, 1642 (2011) (Kennedy, J., concurring) (noting that a "negative injunction [i]s nothing more than the pre-emptive assertion in equity of a defense").

The substantive identity between an injunction and defense in this context is also illustrated through a hypothetical modification of the facts in *Williamson County*. The developer in that case sought an injunction ordering zoning officials to allow it to develop its land in accordance with a previous zoning ordinance, on the theory that application to the developer of a new, more restrictive ordinance effected a taking. See 473 U.S. 182. This Court held that the takings claim was premature because the developer had not filed an inverse condemnation action under state law to seek just compensation for any alleged taking. See *id.* at 194-197. If instead of seeking an injunction, the developer had begun to develop the land in open defiance of the new ordinance, and then faced an enforcement action, the logic of *Williamson County* would not permit the developer to assert a takings "defense"—*i.e.*, an assertion that it was entitled to violate the new ordinance because that ordinance resulted in an unconstitutional taking. The defect in the takings claim in that situation would be exactly the same as in the injunctive action; in both instances, the developer could not claim a violation of the Just Compensation Clause if procedures for seeking just compensation were available. See *id.* at 195.

c. Petitioners contend that this Court "has heard Takings Clause defenses to government-initiated actions on the merits on numerous occasions," Pet. Br. 24; see also *id.* at 43-44. But the cited cases do not hold that injunctive relief or a takings "defense" is available in all situations. Rather, the cited authorities generally involved situations in which the government *failed* to provide a reasonable, certain, and adequate procedure for monetary compensation, such as that in the Tucker Act, and several of them expressly recognized that the

government may take property so long as just compensation is provided. See *Miller* v. *Schoene*, 276 U.S. 272, 277 (1928) ("[T]he statute as interpreted allows [for no] compensation for the value of the standing cedars or the decrease in the market value of the realty."); *Missouri Pac. Ry.* v. *Nebraska*, 217 U.S. 196, 205 (1910) ("[T]here is no provision in the statute for compensation to the railroad for its outlay in building and maintaining the side tracks required."); *Union Bridge Co.* v. *United States*, 204 U.S. 364, 388 (1907) ("[The act] makes no provision, and the United States has not offered, to compensate [plaintiff] for the sum that will necessarily be expended in order to make the alterations or changes required by the order of the Secretary of War."); *Chicago, Burlington & Quincy Ry.* v. *Illinois*, 200 U.S. 561, 564-567, 582 (1906) (noting that the state statute provided for costs to be paid by the State "*or by the railroad company*, as the case may be," and the State's notice to the property owner made clear that it would not offer compensation in that instance); *St. Louis & S.F. Ry.* v. *Gill*, 156 U.S. 649, 666 (1895) ("[T]he present [case] is one [in which] there is no opportunity to resort to a compendious remedy."); see also *Kaiser Aetna* v. *United States*, 444 U.S. 164, 180 (1979) (holding that government may not take the property at issue "without invoking its eminent domain power *and paying just compensation*") (emphasis added).[17]

---

[17] In *Pruneyard Shopping Center* v. *Robins*, 447 U.S. 74 (1980), this Court based its decision on the concession that, if there were a taking, then "no compensation, just or otherwise, [was] paid to the appellants," *id.* at 82 n.5. Moreover, no state procedure for receiving monetary compensation for the alleged taking was apparent. The alleged taking in that case—allowing unwanted speech and petitioning inside the property owner's shopping mall—derived directly from the Cali-

The "early historical record" discussed by petitione (Pet. Br. 29-32) is similarly unhelpful to them. As a initial matter, this Court did not hold that the Ju Compensation Clause applies to the States until i decision in *Chicago, Burlington & Quincy R.R.* v. *Ch cago*, 166 U.S. 226, 241 (1897), so cases involving cha lenges to state action prior to that decision are not i structive. See *Bonaparte* v. *Camden & A.R. Co.*, 3 Cas. 821, 828 & n.2, 831 (C.C.N.J. 1830) (noting that ' may well be doubted whether as a constitutional pro sion, [the Just Compensation Clause] applies to the sta governments," and that "[s]ince [the] opinion [in *Bon parte*] was prepared," the Supreme Court had held th it did not) (citing *Barron* v. *Baltimore*, 32 U.S. (7 Pe 243 (1833)). Additionally, cases against federal defen ants decided before 1887—when the Tucker Act w enacted and generally made monetary compensati available, see Act of Mar. 3, 1887, ch. 359, 24 Stat. 505 are likewise inapposite.

Even putting those defects aside, the decisions pe tioners cite are inapposite. *Bonaparte* agreed that alleged taking "is not obnoxious to Magna Charta, or i construction in England or this state," if the law "pr scribes a mode of proceeding by which compensati shall be ascertained and made." 3 F. Cas. at 828. Sin larly, *Baring* v. *Erdman*, 2 F. Cas. 784 (C.C.E.D. P 1834), involved a state law under which "[n]o provision made for compensation to the owner," and the court fact denied an injunction. *Id.* at 789. The court o served that "a court of equity * * * would not inte fere, if a just compensation was offered, or the state w

---

fornia constitution as interpreted by the California Supreme Cou neither of which discussed any mechanism for recovering just co pensation for any alleged taking that might thereby result. *Id.* at

willing to make some equitable adjustment of the damages." *Id.* at 791. *Thacher* v. *Dartmouth Bridge Co.*, 35 Mass. 501, 501 (1836), also involved an act that "did not provide any mode of ascertaining or paying the damage," and the same is true for *Sinnickson* v. *Johnson*, 17 N.J.L. 129, 144 (1839) ("yet the statute which authorizes the act, has not provided compensation for the injury") (opinion of Dayton, J.); *Bloodgood* v. *Mohawk & Hudson R.R.*, 18 Wend. 9, 19 (N.Y. 1837) (chancellor's opinion) (statute enacted "without having made an adequate and certain provision for the recovery of the damages"); and *Perry* v. *Wilson*, 7 Mass. 393, 395 (1811) ("But in this statute, no compensation is provided, nor any means of ascertaining or securing the payment of it declared.").

Nor do the later nineteenth century cases cited by petitioners (Pet. Br. 32-33, 44-45) support their contention that a property owner may always raise a takings defense to a government action, even where injunctive relief would be unavailable. Instead, they confirm that a state law violates the Just Compensation Clause only where it "will not admit of the [property owner] earning such compensation as under all the circumstances is just to it," *Smyth* v. *Ames*, 169 U.S. 466, 526 (1898), overruled on other grounds, 315 U.S. 575 (1942), and that "[e]quitable jurisdiction may be invoked" only "in view of the inadequacy of the legal remedy," *Osborne* v. *Missouri Pac. Ry.*, 147 U.S. 248, 258 (1893) (construing state constitution). See *Pumpelly* v. *Green Bay & Miss. Canal Co.*, 80 U.S. (13 Wall.) 166, 176 (1872) (observing that "it does not appear that any statute made provision for compensation to the plaintiff, or those similarly injured, for damages to their lands.") (decided under state constitution); *Sanborn* v. *Belden*, 51 Cal. 266, 269 (1876) (no "certain and adequate compensation" available)

(decided under state constitutional provision); *California Pac. R.R.* v. *Central Pac. R.R.*, 47 Cal. 528, 53 (1874) ("It seems clear that the defendant had no plain speedy, and adequate remedy.") (decided under stat constitution).

In sum, where the government has established a pro cedure to obtain monetary compensation (whethe through the statute that causes the alleged taking, general statute like the Tucker Act, or a combination c the two, see *Regional Rail*, 419 U.S. at 148), there ca be no claim for injunctive relief, and hence no right t assert a takings "defense" to government action.

d. Petitioners argue that the requirement that a pro perty owner seek just compensation through availabl procedures should not be considered a matter of "ripe ness" that concerns the court's "jurisdiction" in th Article III sense of that term. Pet. Br. 38-42. Petitior ers contend instead that the requirement to seek com pensation under the Tucker Act should be understood a a "substantive ingredient[] of a claim" under the Jus Compensation Clause, *id.* at 42.

This Court has often referred to the requirement a involving a question of "ripeness," stating that a clair under the Just Compensation Clause is "premature" : there is an avenue for monetary relief that the propert owner has not yet pursued and that has not been show to be unavailable. *Williamson County*, 473 U.S. at 19 ("the taking claim is not yet ripe"); *id.* at 195 ("[W] have held that taking claims against the Federal Gov ernment are premature until the property owner ha availed itself of the process provided by the Tucke Act."); *Monsanto Co.*, 467 U.S. at 1013 ("any finding tha there has been an actual taking would be premature" *id.* at 1019 ("Because we hold that the Tucker Act i

available as a remedy for any uncompensated taking * * * , Monsanto's challenges * * * are not ripe for our resolution."); *First English Evangelical Lutheran Church*, 482 U.S. at 312 n.6 ("Our cases have also required that one seeking compensation must 'seek compensation through the procedures the State has provided for doing so' before the claim is ripe for review.").

On the other hand, the Court has sometimes stated that when a property owner fails to avail himself of a suit under the Tucker Act or similar procedures for obtaining compensation, his Just Compensation Clause claim will fail on the merits. See *Williamson County*, 473 U.S. at 195 ("[T]he property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and been denied just compensation."); see *id.* at 194-195 (noting that if resort to adequate process yields just compensation, "then the property owner 'has no claim against the Government'"); *id.* at 195 ("[A] property owner has not suffered a violation of the Just Compensation Clause until the owner has unsuccessfully attempted to obtain just compensation through the [available] procedures."); *Larson*, 337 U.S. at 697 n.18 ("[T]he availability of a suit for compensation against the sovereign will defeat a contention that the action is unconstitutional as a violation of the Fifth Amendment."); *Hodel*, 452 U.S. at 297 n.40 ("[A]n alleged taking *is not unconstitutional* unless just compensation is unavailable.") (emphasis added).

Whether conceived of as a question of jurisdiction under the particular statutory regime governing here or as a question going to the merits, the outcome in this case is the same. As petitioners note, Br. 3, 13-14, the court of appeals affirmed the judgment of the district court denying relief on the merits, rather than ordering

the case dismissed for lack of jurisdiction; if (as pet tioners urge) their failure to seek a Tucker Act remed goes to the merits of their claims rather than the court' jurisdiction, then the court of appeals' judgment affirm ing the district court's judgment in its entirety wa correct.

e. Petitioners assert that it "makes little sense to b furcate proceedings," Br. 27, by requiring propert owners to assert non-Just Compensation Clause claim or defenses against a government enforcement proceed ing in one action (in district court), and bring a separat Just Compensation Clause claim in another (in th Court of Federal Claims). But there is nothing od about that result. If a property owner has a Just Com pensation Clause claim against the federal governmen the owner must ordinarily seek monetary relief in th Court of Federal Claims. The fact that the propert owner may also have *other* claims or grounds for relie against the federal government—even claims that aris out of the same set of facts—does not alter that re quirement. See *United States* v. *Tohono O'Odham Na tion*, 131 S. Ct. 1723, 1730 (2011) (rejecting contentio that it would be unjust to "forc[e] plaintiffs to choos between partial remedies available in different courts" see also *id.* at 1734 (Sotomayor, J., concurring in th judgment) ("The jurisdictional scheme governing actior against the United States often requires * * * plain tiffs to file two actions in different courts to obtain com plete relief in connection with one set of facts. As ju one example, an action seeking injunctive relief to se aside agency action must proceed in district court, but claim that the same agency action constitutes a taking property requiring just compensation must proceed the [Court of Federal Claims]."). The Tucker Act fu

nishes a reasonable, certain, and adequate procedure to obtain just compensation for an alleged taking; it does not cease to be so simply because a property owner might also have other constitutional or non-constitutional claims against the federal government.

3. The AMAA's language, context, and history do not reflect a congressional preference for an injunction over the payment of compensation in circumstances such as those present here

Petitioners contend that where Congress would not have intended for the United States to pay for the government's action if a taking were found, then a monetary remedy under the Tucker Act is unavailable. In such cases, petitioners continue, it follows that either an action for an injunction to restrain the alleged taking, or the assertion of a takings defense to a government enforcement action, is appropriate. Pet. Br. 37-38.

a. This contention is not properly before the Court. Petitioners did not make this argument in the court of appeals, nor did they advance it in their petition for a writ of certiorari. It was identified for the first time in the government's brief in opposition, which took the position that the Court should not grant certiorari to address it in the first instance. See Br. in Opp. 16 n.4. Nor is there any reason for the Court to address this question now that it has granted certiorari. Even assuming *arguendo* that Congress would have preferred an injunction against operation of the AMAA in the event it were found to impose a taking to an order for payment of compensation, that would not mean that a takings "defense" would be available here. As noted above (pp. 25-28, *supra*), this case involves judicial review of sanctions imposed on petitioners in their capaci-

ty as handlers, and no takings defense is available t them in that capacity.

b. Were the Court to address this issue, petitioner are correct in their general premise that there is a cat gory of cases in which a takings claim may be cognizab in a suit for equitable relief in district court, notwitl standing the Tucker Act, because the particular statut ry provision involved is not properly understood to co template the payment of compensation by the Unite States if it were found to result in a taking. But, al hough the question is close, we do not believe that th AMAA falls within that category in the narrow circun stances presented here.

In determining whether a case falls into that cat gory—meaning that an action would lie in district cou for equitable relief to prevent the operation of a feder statute that allegedly results in a taking—the cou should decide whether, in light of the specific statute language, context, and history, Congress would ha intended to pay compensation if the governmental acti could be implemented only if accompanied by compens tion, or whether Congress would have instead intend to have the legislation enjoined if it were found to co stitute a taking. See *Eastern Enterprises*, 524 U.S. 521 (plurality opinion) (citing U.S. Br. at 38 n.30, *Eas ern Enterprises*, *supra*, No. 97-42); see also U.S. Br. 13 n.5, *Babbitt* v. *Youpee*, 519 U.S. 234 (1997), No. 9 1595; U.S. Br. at 25 n.16, *Hodel* v. *Irving*, 481 U.S. 7 (1987), No. 85-637.[18]

To be sure, there are some aspects of the AMAA th indicate that it falls in this category. Marketing orde

---

[18] Cf. *Preseault*, 494 U.S. at 14-15 ("We have previously rejected t argument that a generalized desire to protect the public fisc is su cient to withdraw relief under the Tucker Act.").

are designed to regulate private parties only. The orders stabilize the market, but without any direct expenditure of government funds. And the AMAA does not appear to contemplate any direct benefit to the government or the acquisition of any property for the government's direct use. The statutory scheme, in short, orders the affairs of private market actors without any direct burden on the public fisc. Those features of the scheme could lead to the conclusion that Congress would not have intended to pay funds from the federal Treasury to maintain the particular program here if it were found to result in a taking, and thus would instead have preferred it to be enjoined rather than give rise to the payment of compensation under the Tucker Act.

The broader structure of the statute, however, suggests that Congress would not have preferred an injunction in district court to an action for compensation under the Tucker Act. Congress designed the AMAA to increase prices for regulated commodities (by limiting supply) and thus assumed the scheme would *benefit* producers. See 7 U.S.C. 601 (absence of regulation had "impair[ed] the purchasing power of farmers and destroy[ed] the value of agricultural assets"); 7 U.S.C. 602(1); J.A. 209; *Block*, 467 U.S. at 346. Congress built that assumption into the statute by giving producers power over the creation and termination of marketing orders. Marketing orders are effective only if approved by two-thirds of the relevant producers (or producers who produce at least two-thirds of the commodity). See 7 U.S.C. 608c(8) and (9)(B). Moreover, the Secretary is required to terminate a marketing order if termination is favored by a majority of producers (assuming that majority also produces a majority of the commodity). 7 U.S.C. 608c(16)(B). And the RAC, which recommends

reserve requirements and administers the reserve poo is controlled by producers. See p. 5, *supra*.

By design, therefore, a marketing order will not cor tinue in operation unless it benefits producers. Not a marketing orders utilize a reserve pool mechanism. Se p. 3, *supra*. But where, as here, such a mechanism i used, even if Congress thought there was a risk that reserve requirement would constitute a taking of a pr ducer's commodities, Congress might well have expecte the just compensation for any such taking to be zer because the marketing order would result in net benefit for producers. See pp. 36-37, *supra*; cf. *Regional Rai* 419 U.S. at 125-131, 148 (finding Tucker Act applicabl where Congress did not intend legislation to requir expenditure of funds beyond those provided by the sta ute, but Congress would have thought such addition expenditure highly unlikely). This suggests that Cor gress would not have preferred an injunction barrin the application of the reserve pool provision to petitior ers to an abstract judicial finding of a taking for whic no compensation was due. And because Congress gave majority of producers control over the regulator scheme, there is reason to believe that Congress woul not have intended for a single disgruntled producer t be able to obtain an injunction against application of th reserve requirement to him on a takings theory, whi still reaping the benefit of the higher prices establishe by others' compliance with the marketing order.

Moreover, the AMAA vests the Executive Branc with significant administrative authority to modify abandon commodity regulation under the statute necessary. That authority could be used in response to just compensation award from the Court of Feder Claims. In particular, Congress gave the Secreta

broad authority to choose which tools he would employ to regulate the market for any particular commodity. See 7 U.S.C. 608c(6). A reserve pool—the regulatory method currently in place for California raisins—is just one of the available options. See 7 U.S.C. 608c(6)(E). Instead of using a reserve pool, the Secretary may limit or allot the quantity of the commodity that handlers may sell in interstate or foreign commerce, see 7 U.S.C. 608c(6)(A) and (C); allot amounts of the commodity that each handler can purchase from each producer, 7 U.S.C. 608c(6)(B); or provide for disposition of all agricultural surpluses, 7 U.S.C. 608c(6)(D).

The Secretary has unilateral authority to "terminate or suspend the operation of [a marketing] order" or one of its provisions "whenever he finds that [the] order * * * obstructs or does not tend to effectuate the declared policy of" the AMAA. 7 U.S.C. 608c(16)(A)(i); see 7 C.F.R. 989.91 (same); see also 60 Fed. Reg. 33,679-33,681 (June 29, 1995) (using this authority to terminate marketing order for Tokay grapes grown in San Joaquin County, California); 50 Fed. Reg. 26,977 (July 1, 1985) (same for domestically produced hops). Among the declared policies of the AMAA is the stabilization of agricultural supplies and prices through use of the Secretary's *regulatory* powers, 7 U.S.C. 602, rather than through use of direct federal subsidies.

Accordingly, an award of monetary compensation from the United States under the Tucker Act arising out of the reserve requirement could prompt the Secretary to terminate the current marketing order on the ground that it was no longer consistent with the policies of the AMAA. 7 U.S.C. 608c(16)(A)(i). He could then adopt a different regulatory strategy. Or, short of termination, the Secretary (or the RAC) could respond to a just com-

pensation order by prospectively altering the percentages of reserve and free raisins, or increasing equitable payments to producers. Either step might serve to eliminate future takings or at least reduce just compensation owed to zero. These features suggest that Congress would not have preferred the inflexible tool of an injunction to a modulated administrative response.

Furthermore, the raisin marketing order has stood for decades, during which the reserve requirement has stabilized the market for producers and handlers alike and created reliance interests. It is thus unlikely that Congress would have intended that such a market be potentially thrown into immediate turmoil through an injunction, rather than elect to pay any necessary just compensation on an interim basis while the government worked to craft new stabilizing measures not requiring any compensation.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General
STUART F. DELERY
Principal Deputy Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
JOSEPH R. PALMORE
Assistant to the Solicitor General
MICHAEL S. RAAB
JOSHUA WALDMAN
Attorneys

RAMONA E. ROMERO
General Counsel
CARRIE F. RICCI
Assistant General Counsel
LESLIE K. LAGOMARCINO
Senior Counsel
Department of Agriculture

FEBRUARY 2013

APPENDIX

1. 7 U.S.C. 601 provides:

Declaration of conditions

It is declared that the disruption of the orderly exchange of commodities in interstate commerce impairs the purchasing power of farmers and destroys the value of agricultural assets which support the national credit structure and that these conditions affect transactions in agricultural commodities with a national public interest, and burden and obstruct the normal channels of interstate commerce.

2. 7 U.S.C. 602 provides:

Declaration of policy; establishment of price basing period; marketing standards; orderly supply flow; circumstances for continued regulation

It is declared to be the policy of Congress—

(1) Through the exercise of the powers conferred upon the Secretary of Agriculture under this chapter, to establish and maintain such orderly marketing conditions for agricultural commodities in interstate commerce as will establish, as the prices to farmers, parity prices as defined by section 1301(a)(1) of this title.

(2) To protect the interest of the consumer by (a) approaching the level of prices which it is declared to be the policy of Congress to establish in subsection (1) of this section by gradual correction of the current

level at as rapid a rate as the Secretary of Agricultur deems to be in the public interest and feasible in vie of the current consumptive demand in domestic an foreign markets, and (b) authorizing no action unde this chapter which has for its purpose the maintenanc of prices to farmers above the level which it is declare to be the policy of Congress to establish in subsectio (1) of this section.

(3) Through the exercise of the powers conferre upon the Secretary of Agriculture under this chapte to establish and maintain such production researcl marketing research, and development projects pr vided in section 608c(6)(I) of this title, such containe and pack requirements provided in section 608c(6)(H of this title[1] such minimum standards of quality an maturity and such grading and inspection require ments for agricultural commodities enumerated i section 608c (2) of this title, other than milk and it products, in interstate commerce as will effectuat such orderly marketing of such agricultural commod ties as will be in the public interest.

(4) Through the exercise of the powers conferre upon the Secretary of Agriculture under this chapte to establish and maintain such orderly marketin conditions for any agricultural commodity enumerate in section 608c(2) of this title as will provide, in th interests of producers and consumers, an orderly flo of the supply thereof to market throughout its norm

---

[1] So in original. Probably should be followed by a comma.

marketing season to avoid unreasonable fluctuations in supplies and prices.

(5) Through the exercise of the power conferred upon the Secretary of Agriculture under this chapter, to continue for the remainder of any marketing season or marketing year, such regulation pursuant to any order as will tend to avoid a disruption of the orderly marketing of any commodity and be in the public interest, if the regulation of such commodity under such order has been initiated during such marketing season or marketing year on the basis of its need to effectuate the policy of this chapter.

3. 7 U.S.C. 608c (2006 & Supp. V 2011) provides in part:

Orders

(1) Issuance by Secretary

The Secretary of Agriculture shall, subject to the provisions of this section, issue, and from time to time amend, orders applicable to processors, associations of producers, and others engaged in the handling of any agricultural commodity or product thereof specified in subsection (2) of this section. Such persons are referred to in this chapter as "handlers". Such orders shall regulate, in the manner hereinafter in this section provided, only such handling of such agricultural commodity, or product thereof, as is in the current of interstate or foreign commerce, or which directly burdens, obstructs, or affects, interstate or foreign

commerce in such commodity or product thereof. In carrying out this section, the Secretary shall complete all informal rulemaking actions necessary to respond to recommendations submitted by administrative committees for such orders as expeditiously as possible but not more than 45 days (to the extent practicable) after submission of the committee recommendations. The Secretary is authorized to implement a producer allotment program and a handler withholding program under the cranberry marketing order in the same crop year through informal rulemaking based on a recommendation and supporting economic analysis submitted by the Cranberry Marketing Committee. Such recommendation and analysis shall be submitted by the Committee no later than March 1 of each year. The Secretary shall establish time frames for each office and agency within the Department of Agriculture to consider the committee recommendations.

(2) Commodities to which applicable

Orders issued pursuant to this section shall be applicable only to (A) the following agricultural commodities and the products thereof (except canned or frozen pears, grapefruit, cherries, apples, or cranberries, the products of naval stores, and the products of honeybees), or to any regional, or market classification of any such commodity or product: Milk, fruits (including filberts, almonds, pecans and walnuts but not including apples, other than apples produced in the States of Washington, Oregon, Idaho, New York, Michigan, Maryland, New Jersey, Indiana, California, Maine, Vermont, New Hampshire, Rhode Island, Mas-

sachusetts, Connecticut, Colorado, Utah, New Mexico, Illinois, and Ohio, and not including fruits for canning or freezing other than pears, olives, grapefruit, cherries, caneberries (including raspberries, blackberries, and loganberries), cranberries, and apples produced in the States named above except Washington, Oregon, and Idaho), tobacco, vegetables (not including vegetables, other than asparagus, for canning or freezing and not including potatoes for canning, freezing, or other processing), hops, honeybees and naval stores as included in the Naval Stores Act [7 U.S.C.A. 91 et seq.] and standards established thereunder (including refined or partially refined oleoresin): *Provided*, That no order issued pursuant to this section shall be effective as to any grapefruit for canning or freezing unless the Secretary of Agriculture determines, in addition to other findings and determinations required by this chapter, that the issuance of such order is approved or favored by the processors who, during a representative period determined by the Secretary, have been engaged in canning or freezing such commodity for market and have canned or frozen for market more than 50 per centum of the total volume of such commodity canned or frozen for market during such representative period; and (B) any agricultural commodity (except honey, cotton, rice, wheat, corn, grain sorghums, oats, barley, rye, sugarcane, sugarbeets, wool, mohair, livestock, soybeans, cottonseed, flaxseed, poultry (but not excepting turkeys and not excepting

poultry which produce commercial eggs), fruits an vegetables for canning or freezing, including potatoe for canning, freezing, or other processing[1] and ap ples), or any regional or market classification thereo not subject to orders under (A) of this subdivision, bu not the products (including canned or frozen commodi ties or products) thereof. No order issued pursuan to this section shall be effective as to cherries, apples or cranberries for canning or freezing unless the Sec retary of Agriculture determines, in addition to othe required findings and determinations, that the issu ance of such order is approved or favored by proces sors who, during a representative period determine by the Secretary, have engaged in canning or freezin such commodity for market and have frozen or canne more than 50 per centum of the total volume of th commodity to be regulated which was canned or froze within the production area, or marketed within th marketing area, defined in such order, during suc representative period. No order issued pursuant t this section shall be applicable to peanuts produced i more than one of the following production areas: th Virginia-Carolina production area, the Southeast pro duction area, and the Southwest production area. I the Secretary determines that the declared policy c this chapter will be better achieved thereby (i) th commodities of the same general class and used wholl or in part for the same purposes may be combined an treated as a single commodity and (ii) the portion of a

---

[1] So in original. Probably should be followed by a comma.

agricultural commodity devoted to or marketed for a particular use or combination of uses, may be treated as a separate agricultural commodity. All agricultural commodities and products covered hereby shall be deemed specified herein for the purposes of subsections (6) and (7) of this section.

(3) Notice and hearing

Whenever the Secretary of Agriculture has reason to believe that the issuance of an order will tend to effectuate the declared policy of this chapter with respect to any commodity or product thereof specified in subsection (2) of this section, he shall give due notice of and an opportunity for a hearing upon a proposed order.

(4) Finding and issuance of order

After such notice and opportunity for hearing, the Secretary of Agriculture shall issue an order if he finds, and sets forth in such order, upon the evidence introduced at such hearing (in addition to such other findings as may be specifically required by this section) that the issuance of such order and all of the terms and conditions thereof will tend to effectuate the declared policy of this chapter with respect to such commodity.

* * * * *

(6) Terms—Other commodities

In the case of the agricultural commodities and the products thereof, other than milk and its products, specified in subsection (2) of this section, orders issued

pursuant to this section shall contain one or more of the following terms and conditions, and (except as provided in subsection (7) of this section), no others:

(A) Limiting, or providing methods for the limitation of, the total quantity of any such commodity or product, or of any grade, size, or quality thereof, produced during any specified period or periods, which may be marketed in or transported to any or all markets in the current of interstate or foreign commerce or so as directly to burden, obstruct, or affect interstate or foreign commerce in such commodity or product thereof, during any specified period or periods by all handlers thereof.

(B) Allotting, or providing methods for allotting, the amount of such commodity or product, or any grade, size, or quality thereof, which each handler may purchase from or handle on behalf of any and all producers thereof, during any specified period or periods, under a uniform rule based upon the amounts sold by such producers in such prior period as the Secretary determines to be representative, or upon the current quantities available for sale by such producers, or both, to the end that the total quantity thereof to be purchased, or handled during any specified period or periods shall be apportioned equitably among producers.

(C) Allotting, or providing methods for allotting, the amount of any such commodity or product, or any grade, size, or quality thereof, which each handler may market in or transport to any or all markets in the

current of interstate or foreign commerce or so as directly to burden, obstruct, or affect interstate or foreign commerce in such commodity or product thereof, under a uniform rule based upon the amounts which each such handler has available for current shipment, or upon the amounts shipped by each such handler in such prior period as the Secretary determines to be representative, or both, to the end that the total quantity of such commodity or product, or any grade, size, or quality thereof, to be marketed in or transported to any or all markets in the current of interstate or foreign commerce or so as directly to burden, obstruct, or affect interstate or foreign commerce in such commodity or product thereof, during any specified period or periods shall be equitably apportioned among all of the handlers thereof.

(D) Determining, or providing methods for determining, the existence and extent of the surplus of any such commodity or product, or of any grade, size, or quality thereof, and providing for the control and disposition of such surplus, and for equalizing the burden of such surplus elimination or control among the producers and handlers thereof.

(E) Establishing or providing for the establishment of reserve pools of any such commodity or product, or of any grade, size, or quality thereof, and providing for the equitable distribution of the net return derived from the sale thereof among the persons beneficially interested therein.

(F) Requiring or providing for the requirement o inspection of any such commodity or product produce during specified periods and marketed by handlers.

(G) In the case of hops and their products in addi tion to, or in lieu of, the foregoing terms and condi tions, orders may contain one or more of the following:

(i) Limiting, or providing methods for the limi tation of, the total quantity thereof, or of any grade type, or variety thereof, produced during any speci fied period or periods, which all handlers may han dle in the current of or so as directly to burden, ob struct, or affect interstate or foreign commerce ir hops or any product thereof.

(ii) Apportioning, or providing methods for ap portioning, the total quantity of hops of the produc tion of the then current calendar year permitted t be handled equitably among all producers in the production area to which the order applies upon the basis of one or more or a combination of the follow ing: The total quantity of hops available or esti mated will become available for market by each producer from his production during such period the normal production of the acreage of hops oper ated by each producer during such period upon the basis of the number of acres of hops in production and the average yield of that acreage during such period as the Secretary determines to be repre sentative, with adjustments determined by the Sec retary to be proper for age of plantings or abnorma conditions affecting yield; such normal production o

historical record of any acreage for which data as to yield of hops are not available or which had no yield during such period shall be determined by the Secretary on the basis of the yields of other acreage of hops of similar characteristics as to productivity, subject to adjustment as just provided for.

(iii) Allotting, or providing methods for allotting, the quantity of hops which any handler may handle so that the allotment fixed for that handler shall be limited to the quantity of hops apportioned under preceding section[5] (ii) to each respective producer of hops; such allotment shall constitute an allotment fixed for that handler within the meaning of subsection (5) of section 608a of this title.

(H) providing[6] a method for fixing the size, capacity, weight, dimensions, or pack of the container, or containers, which may be used in the packaging, transportation, sale, shipment, or handling of any fresh or dried fruits, vegetables, or tree nuts: *Provided, however*, That no action taken hereunder shall conflict with the Standard Containers Act of 1916 (15 U.S.C. 251-256) and the Standard Containers Act of 1928 (15 U.S.C. 257-257i);[7]

(I) establishing[6] or providing for the establishment of production research, marketing research and development projects designed to assist, improve, or

---

[5] So in original. Probably should be "clause".

[6] So in original. Probably should be capitalized.

[7] So in original. Probably should be a period.

promote the marketing, distribution, and consumption or efficient production of any such commodity or product, the expense of such projects to be paid from funds collected pursuant to the marketing order *Provided*, That with respect to orders applicable to almonds, filberts (otherwise known as hazelnuts) California-grown peaches, cherries, papayas, carrots citrus fruits, onions, Tokay grapes, pears, dates plums, nectarines, celery, sweet corn, limes, olives pecans, eggs, avocados, apples, raisins, walnuts, tomatoes, caneberries (including raspberries, blackberries and loganberries), Florida grown[8] strawberries, or cranberries, such projects may provide for any form of marketing promotion including paid advertising and with respect to almonds, filberts (otherwise known as hazelnuts), raisins, walnuts, olives, Florida Indian River grapefruit, and cranberries may provide for crediting the pro rata expense assessment obligations of a handler with all or any portion of his direct expenditures for such marketing promotion including paid advertising as may be authorized by the order and when the handling of any commodity for canning or freezing is regulated, then any such projects may also deal with the commodity or its products in canned or frozen form: *Provided further*, That the inclusion in a Federal marketing order of provisions for research and marketing promotion, including paid advertising shall not be deemed to preclude, preempt or supersede

---

[8] So in original. Probably should be "Florida-grown".

any such provisions in any State program covering the same commodity.

(J) In the case of pears for canning or freezing, any order for a production area encompassing territory within two or more States or portions thereof shall provide that the grade, size, quality, maturity, and inspection regulation under the order applicable to pears grown within any such State or portion thereof may be recommended to the Secretary by the agency established to administer the order only if a majority of the representatives from that State on such agency concur in the recommendation each year.

(7) Terms common to all orders

In the case of the agricultural commodities and the products thereof specified in subsection (2) of this section orders shall contain one or more of the following terms and conditions:

(A) Prohibiting unfair methods of competition and unfair trade practices in the handling thereof.

(B) Providing that (except for milk and cream to be sold for consumption in fluid form) such commodity or product thereof, or any grade, size, or quality thereof shall be sold by the handlers thereof only at prices filed by such handlers in the manner provided in such order.

(C) Providing for the selection by the Secretary of Agriculture, or a method for the selection, of an agency or agencies and defining their powers and duties, which shall include only the powers:

(i) To administer such order in accordance with its terms and provisions;

(ii) To make rules and regulations to effectuate the terms and provisions of such order;

(iii) To receive, investigate, and report to the Secretary of Agriculture complaints of violations of such order; and

(iv) To recommend to the Secretary of Agriculture amendments to such order.

No person acting as a member of an agency established pursuant to this paragraph shall be deemed to be acting in an official capacity, within the meaning of section 610(g) of this title, unless such person receives compensation for his personal services from funds of the United States. There shall be included in the membership of any agency selected to administer a marketing order applicable to grapefruit for canning or freezing one or more representatives of processors of the commodity specified in such order.

(D) Incidental to, and not inconsistent with, the terms and conditions specified in subsections (5), (6), and (7) of this section and necessary to effectuate the other provisions of such order.

(8) Orders with marketing agreement

Except as provided in subsection (9) of this section, no order issued pursuant to this section shall become effective until the handlers (excluding cooperative associations of producers who are not engaged in processing, distributing, or shipping the commodity or

product thereof covered by such order) of not less than 50 per centum of the volume of the commodity or product thereof covered by such order which is produced or marketed within the production or marketing area defined in such order have signed a marketing agreement, entered into pursuant to section 608b of this title, which regulates the handling of such commodity or product in the same manner as such order, except that as to citrus fruits produced in any area producing what is known as California citrus fruits no order issued pursuant to this subsection shall become effective until the handlers of not less than 80 per centum of the volume of such commodity or product thereof covered by such order have signed such a marketing agreement: *Provided*, That no order issued pursuant to this subsection shall be effective unless the Secretary of Agriculture determines that the issuance of such order is approved or favored:

(A) By at least two-thirds of the producers who (except that as to citrus fruits produced in any area producing what is known as California citrus fruits said order must be approved or favored by three-fourths of the producers), during a representative period determined by the Secretary, have been engaged, within the production area specified in such marketing agreement or order, in the production for market of the commodity specified therein, or who, during such representative period, have been engaged in the production of such commodity for sale in the marketing area specified in such marketing agreement, or order, or

(B) By producers who, during such representativ period, have produced for market at least two-thirds o the volume of such commodity produced for marke within the production area specified in such marketin agreement or order, or who, during such representa tive period, have produced at least two-thirds of th volume of such commodity sold within the marketin area specified in such marketing agreement or order.

(9) Orders with or without marketing agreement

Any order issued pursuant to this section shall be come effective in the event that, notwithstanding th refusal or failure of handlers (excluding cooperativ associations of producers who are not engaged in pro cessing, distributing, or shipping the commodity o product thereof covered by such order) of more tha 50 per centum of the volume of the commodity o product thereof (except that as to citrus fruits pro duced in any area producing what is known as Califor nia citrus fruits said per centum shall be 80 per cen tum) covered by such order which is produced or mar keted within the production or marketing area define in such order to sign a marketing agreement relatin to such commodity or product thereof, on which hearing has been held, the Secretary of Agricultur determines:

(A) That the refusal or failure to sign a marketin agreement (upon which a hearing has been held) b the handlers (excluding cooperative associations producers who are not engaged in processing, distrit uting, or shipping the commodity or product there

covered by such order) of more than 50 per centum of the volume of the commodity or product thereof (except that as to citrus fruits produced in any area producing what is known as California citrus fruits said per centum shall be 80 per centum) specified therein which is produced or marketed within the production or marketing area specified therein tends to prevent the effectuation of the declared policy of this chapter with respect to such commodity or product, and

(B) That the issuance of such order is the only practical means of advancing the interests of the producers of such commodity pursuant to the declared policy, and is approved or favored:

(i) By at least two-thirds of the producers (except that as to citrus fruits produced in any area producing what is known as California citrus fruits said order must be approved or favored by three-fourths of the producers) who, during a representative period determined by the Secretary, have been engaged, within the production area specified in such marketing agreement or order, in the production for market of the commodity specified therein, or who, during such representative period, have been engaged in the production of such commodity for sale in the marketing area specified in such marketing agreement, or order, or

(ii) By producers who, during such representative period, have produced for market at least two-thirds of the volume of such commodity produced for market within the production area specified in such

marketing agreement or order, or who, during such representative period, have produced at least two-thirds of the volume of such commodity sold within the marketing area specified in such marketing agreement or order.

(10) Manner of regulation and applicability

No order shall be issued under this section unless it regulates the handling of the commodity or product covered thereby in the same manner as, and is made applicable only to persons in the respective classes of industrial or commercial activity specified in, a marketing agreement upon which a hearing has been held. No order shall be issued under this chapter prohibiting, regulating, or restricting the advertising of any commodity or product covered thereby, nor shall any marketing agreement contain any provision prohibiting, regulating, or restricting the advertising of any commodity, or product covered by such marketing agreement.

(11) Regional application

(A) No order shall be issued under this section which is applicable to all production areas or marketing areas, or both, of any commodity or product thereof unless the Secretary finds that the issuance of several orders applicable to the respective regional production areas or regional marketing areas, or both, as the case may be, of the commodity or product would not effectively carry out the declared policy of this chapter.

(B) Except in the case of milk and its products, orders issued under this section shall be limited in their application to the smallest regional production areas or regional marketing areas, or both, as the case may be, which the Secretary finds practicable, consistently with carrying out such declared policy.

(C) All orders issued under this section which are applicable to the same commodity or product thereof shall, so far as practicable, prescribe such different terms, applicable to different production areas and marketing areas, as the Secretary finds necessary to give due recognition to the differences in production and marketing of such commodity or product in such areas.

(D) In the case of milk and its products, no county or other political subdivision of the State of Nevada shall be within the marketing area definition of any order issued under this section.

(12) Cooperative association representation

Whenever, pursuant to the provisions of this section, the Secretary is required to determine the approval or disapproval of producers with respect to the issuance of any order, or any term or condition thereof, or the termination thereof, the Secretary shall consider the approval or disapproval by any cooperative association of producers, bona fide engaged in marketing the commodity or product thereof covered by such order, or in rendering services for or advancing the interests of the producers of such commodity, as the approval or disapproval of the producers who are members of,

stockholders in, or under contract with, such cooperative association of producers.

(13) Retailer and producer exemption

(A) No order issued under subsection (9) of this section shall be applicable to any person who sells agricultural commodities or products thereof at retail in his capacity as such retailer, except to a retailer in his capacity as a retailer of milk and its products.

(B) No order issued under this chapter shall be applicable to any producer in his capacity as a producer.

(14) Violation of order

(A) Any handler subject to an order issued under this section, or any officer, director, agent, or employee of such handler, who violates any provision of such order shall, on conviction, be fined not less than $50 or more than $5,000 for each such violation, and each day during which such violation continues shall be deemed a separate violation. If the court finds that a petition pursuant to subsection (15) of this section was filed and prosecuted by the defendant in good faith and not for delay, no penalty shall be imposed under this subsection for such violations as occurred between the date upon which the defendant's petition was filed with the Secretary, and the date upon which notice of the Secretary's ruling thereon was given to the defendant in accordance with regulations prescribed pursuant to subsection (15) of this section.

(B) Any handler subject to an order issued under this section, or any officer, director, agent, or employ-

ee of such handler, who violates any provision of such order may be assessed a civil penalty by the Secretary not exceeding $1,000 for each such violation. Each day during which such violation continues shall be deemed a separate violation, except that if the Secretary finds that a petition pursuant to paragraph (15) was filed and prosecuted by the handler in good faith and not for delay, no civil penalty may be assessed under this paragraph for such violations as occurred between the date on which the handler's petition was filed with the Secretary, and the date on which notice of the Secretary's ruling thereon was given to the handler in accordance with regulations prescribed pursuant to paragraph (15). The Secretary may issue an order assessing a civil penalty under this paragraph only after notice and an opportunity for an agency hearing on the record. Such order shall be treated as a final order reviewable in the district courts of the United States in any district in which the handler subject to the order is an inhabitant, or has the handler's principal place of business. The validity of such order may not be reviewed in an action to collect such civil penalty.

(15) Petition by handler and review

(A) Any handler subject to an order may file a written petition with the Secretary of Agriculture, stating that any such order or any provision of any such order or any obligation imposed in connection therewith is not in accordance with law and praying for a modification thereof or to be exempted therefrom. He shall thereupon be given an opportunity for a

hearing upon such petition, in accordance with regulations made by the Secretary of Agriculture, with the approval of the President. After such hearing, the Secretary shall make a ruling upon the prayer of such petition which shall be final, if in accordance with law.

(B) The District Courts of the United States in any district in which such handler is an inhabitant, or has his principal place of business, are hereby vested with jurisdiction in equity to review such ruling, provided a bill in equity for that purpose is filed within twenty days from the date of the entry of such ruling. Service of process in such proceedings may be had upon the Secretary by delivering to him a copy of the bill of complaint. If the court determines that such ruling is not in accordance with law, it shall remand such proceedings to the Secretary with directions either (1) to make such ruling as the court shall determine to be in accordance with law, or (2) to take such further proceedings as, in its opinion, the law requires. The pendency of proceedings instituted pursuant to this subsection (15) shall not impede, hinder, or delay the United States or the Secretary of Agriculture from obtaining relief pursuant to section 608a(6) of this title. Any proceedings brought pursuant to section 608a(6) of this title (except where brought by way of counterclaim in proceedings instituted pursuant to this subsection (15)) shall abate whenever a final decree has been rendered in proceedings between the same parties, and covering the same subject matter, instituted pursuant to this subsection (15).

(16) Termination of orders and marketing agreements

(A)(i) Except as provided in clause (ii), the Secretary of Agriculture shall, whenever he finds that any order issued under this section, or any provision thereof, obstructs or does not tend to effectuate the declared policy of this chapter, terminate or suspend the operation of such order or such provision thereof.

(ii) The Secretary may not terminate any order issued under this section for a commodity for which there is no Federal program established to support the price of such commodity unless the Secretary gives notice of, and a statement of the reasons relied upon by the Secretary for, the proposed termination of such order to the Committee on Agriculture, Nutrition, and Forestry of the Senate and the Committee on Agriculture of the House of Representatives not later than 60 days before the date such order will be terminated.

(B) The Secretary shall terminate any marketing agreement entered into under section 608b of this title, or order issued under this section, at the end of the then current marketing period for such commodity, specified in such marketing agreement or order, whenever he finds that such termination is favored by a majority of the producers who, during a representative period determined by the Secretary, have been engaged in the production for market of the commodity specified in such marketing agreement or order, within the production area specified in such marketing agreement or order, or who, during such representative period, have been engaged in the production of such commodity for sale within the marketing area specified in such marketing agreement or order:

Provided, That such majority have, during such representative period, produced for market more than 50 per centum of the volume of such commodity produced for market within the production area specified in such marketing agreement or order, or have, during such representative period, produced more than 50 per centum of the volume of such commodity sold in the marketing area specified in such marketing agreement or order, but such termination shall be effective only if announced on or before such date (prior to the end of the then current marketing period) as may be specified in such marketing agreement or order.

(C) Except as otherwise provided in this subsection with respect to the termination of an order issued under this section, the termination or suspension of any order or amendment thereto or provision thereof shall not be considered an order within the meaning of this section.

(17) Provisions applicable to amendments

(A) Applicability to amendments

The provisions of this section and section 608d of this title applicable to orders shall be applicable to amendments to orders.

(B) Supplemental rules of practice

(i) In general

Not later than 60 days after the date of enactment of this subparagraph, the Secretary shall issue, using informal rulemaking, supplemental rules of practice to define guidelines and time-

frames for the rulemaking process relating to amendments to orders.

(ii) Issues

At a minimum, the supplemental rules of practice shall establish—

(I) proposal submission requirements;

(II) pre-hearing information session specifications;

(III) written testimony and data request requirements;

(IV) public participation timeframes; and

(V) electronic document submission standards.

(iii) Effective date

The supplemental rules of practice shall take effect not later than 120 days after the date of enactment of this subparagraph, as determined by the Secretary.

(C) Hearing timeframes

(i) In general

Not more than 30 days after the receipt of a proposal for an amendment hearing regarding a milk marketing order, the Secretary shall—

(I) issue a notice providing an action plan and expected timeframes for completion of the

hearing not more than 120 days after the date of the issuance of the notice;

(II)(aa) issue a request for additional information to be used by the Secretary in making a determination regarding the proposal; and

(bb) if the additional information is not provided to the Secretary within the timeframe requested by the Secretary, issue a denial of the request; or

(III) issue a denial of the request.

(ii) Requirement

A post-hearing brief may be filed under this paragraph not later than 60 days after the date of an amendment hearing regarding a milk marketing order.

(iii) Recommended decisions

A recommended decision on a proposed amendment to an order shall be issued not later than 90 days after the deadline for the submission of post-hearing briefs.

(iv) Final decisions

A final decision on a proposed amendment to an order shall be issued not later than 60 days after the deadline for submission of comments and exceptions to the recommended decision issued under clause (iii).

(D) Industry assessments

If the Secretary determines it is necessary to improve or expedite rulemaking under this subsection, the Secretary may impose an assessment on the affected industry to supplement appropriated funds for the procurement of service providers, such as court reporters.

(E) Use of informal rulemaking

The Secretary may use rulemaking under section 553 of Title 5 to amend orders, other than provisions of orders that directly affect milk prices.

(F) Avoiding duplication

The Secretary shall not be required to hold a hearing on any amendment proposed to be made to a milk marketing order in response to an application for a hearing on the proposed amendment if—

(i) the application requesting the hearing is received by the Secretary not later than 90 days after the date on which the Secretary has announced the decision on a previously proposed amendment to that order; and

(ii) the 2 proposed amendments are essentially the same, as determined by the Secretary.

(G) Monthly feed and fuel costs for make allowances

As part of any hearing to adjust make allowances under marketing orders commencing prior to September 30, 2012, the Secretary shall—

(i) determine the average monthly prices of feed and fuel incurred by dairy producers in the relevant marketing area;

(ii) consider the most recent monthly feed and fuel price data available; and

(iii) consider those prices in determining whether or not to adjust make allowances.

* * * * *

(19) Producer referendum

For the purpose of ascertaining whether the issuance of an order is approved or favored by producers or processors, as required under the applicable provisions of this chapter, the Secretary may conduct a referendum among producers or processors and in the case of an order other than an amendatory order shall do so. The requirements of approval or favor under any such provision shall be held to be complied with if, of the total number of producers or processors, or the total volume of production, as the case may be, represented in such referendum, the percentage approving or favoring is equal to or in excess of the percentage required under such provision. The terms and conditions of the proposed order shall be described by the Secretary in the ballot used in the conduct of the referendum. The nature, content, or extent of such description shall not be a basis for attacking the legality of the order or any action relating thereto. Nothing in this subsection shall be construed as limiting representation by cooperative associations as provided in subsection (12) of this section. For the purpose of

ascertaining whether the issuance of an order applicable to pears for canning or freezing is approved or favored by producers as required under the applicable provisions of this chapter, the Secretary shall conduct a referendum among producers in each State in which pears for canning or freezing are proposed to be included within the provisions of such marketing order and the requirements of approval or favor under any such provisions applicable to pears for canning or freezing shall be held to be complied with if, of the total number of producers, or the total volume of production, as the case may be, represented in such referendum, the percentage approving or favoring is equal to or in excess of 66 2/3 per centum except that in the event that pear producers in any State fail to approve or favor the issuance of any such marketing order, it shall not be made effective in such State.

4. 7 U.S.C. 608d provides:

Books and records

(1) All parties to any marketing agreement, and all handlers subject to an order, shall severally, from time to time, upon the request of the Secretary, furnish him with such information as he finds to be necessary to enable him to ascertain and determine the extent to which such agreement or order has been carried out or has effectuated the declared policy of this chapter and with such information as he finds to be necessary to determine whether or not there has been any abuse of the privilege of exemptions from the antitrust laws.

Such information shall be furnished in accordance with forms of reports to be prescribed by the Secretary. For the purpose of ascertaining the correctness of any report made to the Secretary pursuant to this subsection, or for the purpose of obtaining the information required in any such report, where it has been requested and has not been furnished, the Secretary is authorized to examine such books, papers, records, copies of income-tax reports, accounts, correspondence, contracts, documents, or memoranda, as he deems relevant and which are within the control (1) of any such party to such marketing agreement, or any such handler, from whom such report was requested or (2) of any person having, either directly or indirectly, actual or legal control of or over such party or such handler or (3) of any subsidiary of any such party, handler, or person.

(2) Notwithstanding the provisions of section 607 of this title, all information furnished to or acquired by the Secretary of Agriculture pursuant to this section, as well as information for marketing order programs that is categorized as trade secrets and commercial or financial information exempt under section 552(b)(4) of title 5 from disclosure under section 552 of such title, shall be kept confidential by all officers and employees of the Department of Agriculture and only such information so furnished or acquired as the Secretary deems relevant shall be disclosed by them, and then only in a suit or administrative hearing brought at the direction, or upon the request, of the Secretary of Agriculture, or to which he or any officer of the United

States is a party, and involving the marketing agreement or order with reference to which the information so to be disclosed was furnished or acquired. Notwithstanding the preceding sentence, any such information relating to a marketing agreement or order applicable to milk may be released upon the authorization of any regulated milk handler to whom such information pertains. The Secretary shall notify the Committee on Agriculture, Nutrition, and Forestry of the Senate and the Committee on Agriculture of the House of Representatives not later than 10 legislative days before the contemplated release under law, of the names and addresses of producers participating in such marketing agreements and orders, and shall include in such notice a statement of reasons relied upon by the Secretary in making the determination to release such names and addresses. Nothing in this section shall be deemed to prohibit (A) the issuance of general statements based upon the reports of a number of parties to a marketing agreement or of handlers subject to an order, which statements do not identify the information furnished by any person, or (B) the publication by direction of the Secretary, of the name of any person violating any marketing agreement or any order, together with a statement of the particular provisions of the marketing agreement or order violated by such person. Any such officer or employee violating the provisions of this section shall upon conviction be subject to a fine of not more than $1,000 or to imprisonment for not more than one year, or to both, and shall be removed from office.

(3) COLLECTION OF CRANBERRY INVENTORY DATA.—

(A) IN GENERAL.—If an order is in effect with respect to cranberries, the Secretary of Agriculture may require persons engaged in the handling or importation of cranberries or cranberry products (including producer-handlers, second handlers, processors, brokers, and importers) to provide such information as the Secretary considers necessary to effectuate the declared policy of this chapter, including information on acquisitions, inventories, and dispositions of cranberries and cranberry products.

(B) DELEGATION TO COMMITTEE.—The Secretary may delegate the authority to carry out subparagraph (A) to any committee that is responsible for administering an order covering cranberries.

(C) CONFIDENTIALITY.—Paragraph (2) shall apply to information provided under this paragraph.

(D) VIOLATIONS.—Any person who violates this paragraph shall be subject to the penalties provided under section 608c(14) of this title.

5. 7 U.S.C. 610 provides:

Administration

(a) Appointment of officers and employees; impounding appropriations

The Secretary of Agriculture may appoint such officers and employees, subject to the provisions of chapter 51 and subchapter III of chapter 53 of title 5,

and such experts, as are necessary to execute the functions vested in him by this chapter: *Provided*, That the Secretary shall establish the Agricultural Adjustment Administration in the Department of Agriculture for the administration of the functions vested in him by this chapter: And *provided further*, That the State Administrator appointed to administer this chapter in each State shall be appointed by the President, by and with the advice and consent of the Senate. Section 8 of Title II of the Act entitled "An Act to maintain the credit of the United States Government," approved March 20, 1933, to the extent that it provides for the impoundment of appropriations on account of reductions in compensation, shall not operate to require such impoundment under appropriations contained in this chapter.

(b) State and local committees or associations of producers; handlers' share of expenses of authority or agency

(1) The Secretary of Agriculture is authorized to establish, for the more effective administration of the functions vested in him by this chapter, State and local committees, or associations of producers, and to permit cooperative associations of producers, when in his judgment they are qualified to do so, to act as agents of their members and patrons in connection with the distribution of payments authorized to be made under section 608 of this title. The Secretary, in the administration of this chapter, shall accord such recognition and encouragement to producer-owned and producer-controlled cooperative associations as will be in

harmony with the policy toward cooperative associations set forth in existing Acts of Congress, and as will tend to promote efficient methods of marketing and distribution.

(2)(i) Each order relating to milk and its products issued by the Secretary under this chapter shall provide that each handler subject thereto shall pay to any authority or agency established under such order such handler's pro rata share (as approved by the Secretary) of such expenses as the Secretary may find will necessarily be incurred by such authority or agency, during any period specified by him, for the maintenance and functioning of such authority or agency, other than expenses incurred in receiving, handling, holding, or disposing of any quantity of milk or products thereof received, handled, held, or disposed of by such authority or agency for the benefit or account of persons other than handlers subject to such order. The pro rata share of the expenses payable by a cooperative association of producers shall be computed on the basis of the quantity of milk or product thereof covered by such order which is distributed, processed, or shipped by such cooperative association of producers.

(ii) Each order relating to any other commodity or product issued by the Secretary under this chapter shall provide that each handler subject thereto shall pay to any authority or agency established under such order such handler's pro rata share (as approved by the Secretary) of such expenses as the Secretary may find are reasonable and are likely to be incurred by

such authority or agency, during any period specified by him, for such purposes as the Secretary may, pursuant to such order, determine to be appropriate, and for the maintenance and functioning of such authority or agency, other than expenses incurred in receiving, handling, holding, or disposing of any quantity of a commodity received, handled, held, or disposed of by such authority or agency for the benefit or account of persons other than handlers subject to such order. The pro rata share of the expenses payable by a cooperative association of producers shall be computed on the basis of the quantity of the agricultural commodity or product thereof covered by such order which is distributed, processed, or shipped by such cooperative association of producers. The payment of assessments for the maintenance and functioning of such authority or agency, as provided for herein, may be required under a marketing agreement or marketing order throughout the period the marketing agreement or order is in effect and irrespective of whether particular provisions thereof are suspended or become inoperative.

(iii) Any authority or agency established under an order may maintain in its own name, or in the name of its members, a suit against any handler subject to an order for the collection of such handler's pro rata share of expenses. The several district courts of the United States are vested with jurisdiction to entertain such suits regardless of the amount in controversy.

(c) Regulations; penalty for violation

The Secretary of Agriculture is authorized, with the approval of the President, to make such regulations with the force and effect of law as may be necessary to carry out the powers vested in him by this chapter. Any violation of any regulation shall be subject to such penalty, not in excess of $100, as may be provided therein.

(d) Regulations of Secretary of the Treasury

The Secretary of the Treasury is authorized to make such regulations as may be necessary to carry out the powers vested in him by this chapter.

(e) Review of official acts

The action of any officer, employee, or agent in determining the amount of and in making any payment authorized to be made under section 608 of this title shall not be subject to review by any officer of the Government other than the Secretary of Agriculture or Secretary of the Treasury.

(f) Geographical application

The provisions of this chapter shall be applicable to the United States and its possessions, except the Virgin Islands, American Samoa, the Canal Zone, and the island of Guam; except that, in the case of sugar beets and sugarcane, the President, if he finds it necessary in order to effectuate the declared policy of this chapter, is authorized by proclamation to make the provisions of this chapter applicable to the Virgin Islands,

American Samoa, the Canal Zone, and/or the island of Guam.

(g) Officers; dealing or speculating in agricultural products; penalties

No person shall, while acting in any official capacity in the administration of this chapter, speculate, directly or indirectly, in any agricultural commodity or product thereof to which this chapter applies, or in contracts relating thereto, or in the stock or membership interest of any association or corporation engaged in handling, processing, or disposing of any such commodity or product. Any person violating this subsection shall upon conviction thereof be fined not more than $10,000 or imprisoned not more than two years, or both.

(h) Adoption of Federal Trade Commission Act; hearings; report of violations to Attorney General

For the efficient administration of the provisions of this chapter, the provisions, including penalties, of sections 48, 49, and 50 of title 15, are made applicable to the jurisdiction, powers, and duties of the Secretary in administering the provisions of this chapter, and to any person subject to the provisions of this chapter, whether or not a corporation. Hearings authorized or required under this chapter shall be conducted by the Secretary of Agriculture or such officer or employee of the Department as he may designate for the purpose. The Secretary may report any violation of any agreement entered into under this chapter, to the Attorney General of the United States, who shall cause appro-

priate proceedings to enforce such agreement to b commenced and prosecuted in the proper courts of th United States without delay.

(i) Cooperation with State authorities; impartin information

The Secretary of Agriculture upon the request of th duly constituted authorities of any State is directed, i order to effectuate the declared policy of this chapte and in order to obtain uniformity in the formulatior administration, and enforcement of Federal and Stat programs relating to the regulation of the handling c agricultural commodities or products thereof, to confe with and hold joint hearings with the duly constitute authorities of any State, and is authorized to cooperat with such authorities; to accept and utilize, with th consent of the State, such State and local officers an employees as may be necessary; to avail himself of th records and facilities of such authorities; to issue or ders (subject to the provisions of section 608c of thi title) complementary to orders or other regulation issued by such authorities; and to make available t such State authorities the records and facilities of th Department of Agriculture: *Provided*, That infor mation furnished to the Secretary of Agriculture pur suant to section 608d(1) of this title shall be mad available only to the extent that such information relevant to transactions within the regulatory jurisdi tion of such authorities, and then only upon a writte agreement by such authorities that the information s furnished shall be kept confidential by them in a mar ner similar to that required of Federal officers an

employees under the provisions of section 608d(2) of this title.

(j) Definitions

The term "interstate or foreign commerce" means commerce between any State, Territory, or possession, or the District of Columbia, and any place outside thereof; or between points within the same State, Territory, or possession, or the District of Columbia, but through any place outside thereof; or within any Territory or possession, or the District of Columbia. For the purpose of this chapter (but in nowise limiting the foregoing definition) a marketing transaction in respect to an agricultural commodity or the product thereof shall be considered in interstate or foreign commerce if such commodity or product is part of that current of interstate or foreign commerce usual in the handling of the commodity or product whereby they, or either of them, are sent from one State to end their transit, after purchase, in another, including all cases where purchase or sale is either for shipment to another State or for the processing within the State and the shipment outside the State of the products so processed. Agricultural commodities or products thereof normally in such current of interstate or foreign commerce shall not be considered out of such current through resort being had to any means or device intended to remove transactions in respect thereto from the provisions of said sections. As used herein, the word "State" includes Territory, the District of Columbia, possession of the United States, and foreign nations.

6. 7 U.S.C. 613 provides:

Termination date; investigations and reports

This chapter shall cease to be in effect whenever the President finds and proclaims that the national economic emergency in relation to agriculture has been ended; and pending such time the President shall by proclamation terminate with respect to any basic agricultural commodity such provisions of this chapter as he finds are not requisite to carrying out the declared policy with respect to such commodity. In the case of sugar beets and sugarcane, the taxes provided by this chapter shall cease to be in effect, and the powers vested in the President or in the Secretary of Agriculture shall terminate on December 31, 1937 unless this chapter ceases to be in effect at an earlier date, as hereinabove provided. The Secretary of Agriculture shall make such investigations and reports thereon to the President as may be necessary to aid him in executing this section.

7. 28 U.S.C. 1491 provides in part:

Claims against United States generally; actions involving Tennessee Valley Authority

(a)(1) The United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liq-

uidated or unliquidated damages in cases not sounding in tort. For the purpose of this paragraph, an express or implied contract with the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, or Exchange Councils of the National Aeronautics and Space Administration shall be considered an express or implied contract with the United States.

* * * * *

8. 7 C.F.R. 989.1 through 989.56 provide:

989.1 Secretary.

Secretary means the Secretary of Agriculture of the United States or any officer or employee of the United States Department of Agriculture to whom authority has heretofore been delegated or to whom authority may hereafter be delegated, to act in his stead.

989.2 Act.

Act means Public Act No. 10, 73d Congress, as amended, and as re-enacted and amended by the Agricultural Marketing Agreement Act of 1937, as amended (sections 1-19, 48 Stat. 31, as amended; 7 U.S.C. 601-674).

989.3 Person.

Person means an individual, partnership, corporation, association, or any other business unit.

989.4 Area.

Area means the State of California.

989.5 Raisins.

Raisins means grapes of any variety grown in the area, from which a significant part of the natural moisture has been removed by sun-drying or artificial dehydration, either prior to or after such grapes have been removed from the vines. Removal of a significant part of the natural moisture means removal which has progressed to the point where the grape skin develops wrinkles characteristic of wrinkles in fully formed raisins.

989.7 Golden Seedless raisins.

Golden Seedless raisins means raisins, the production of which includes soda dipping, sulfuring, and artificial dehydration.

989.8 Natural condition raisins.

Natural condition raisins means raisins the production of which includes sun-drying or artificial dehydration but which have not been further processed to a point where they meet any of the conditions for "packed raisins", as defined in § 989.9.

989.9 Packed raisins.

Packed raisins means raisins which have been stemmed, graded, sorted, cleaned, or seeded, and placed in any container customarily used in the marketing of raisins or in any container suitable or usable for such marketing. Raisins in the process of being packed or raisins which are partially packed shall be subject to the same requirements as packed raisins.

989.10 Varietal types.

Varietal types means raisins generally recognized as possessing characteristics differing from other raisins in a degree sufficient to make necessary or desirable separate identification and classification. Varietal types are the following: Natural (sun-dried) Seedless, Dipped Seedless, Golden Seedless, Muscats (including other raisins with seeds), Sultana, Zante Currant, Monukka, and Oleate and Related Seedless: *Provided*, That the Committee may, subject to approval of the Secretary, change this list of varietal types.

989.11 Producer.

Producer means any person engaged in a proprietary capacity in the production of grapes which are sun-dried or dehydrated by artificial means until they become raisins: *Provided*, That a "producer" shall include any person whose production unit has qualified for diversion under a diversion program announced by the Committee.

989.12 Dehydrator.

Dehydrator means any person who produces raisins by dehydrating grapes by artificial means.

989.12a Cooperative bargaining association.

Cooperative bargaining association means a nonprofit cooperative association of raisin producers engaged within the area in bargaining with handlers as to price and otherwise arranging for the sale of natural condition raisin of its members.

989.13 Processor.

Processor means any person who receives or ac quires natural condition raisins, off-grade raisins other failing raisins or raisin residual material an uses them or it within the area, with or without othe ingredients, in the production of a product other tha raisins, for market or distribution.

989.14 Packer.

Packer means any person who, within the area stems, sorts, cleans, or seeds raisins, grades stemme raisins, or packages raisins for market as raisins *Provided*, That:

(a) No producer with respect to the raisins pro duced by him, and no group of producers with respec to raisins produced by the producers comprising th group, and not otherwise a packer, shall be deemed packer if he or it sorts or cleans (with or without wa ter) such raisins in their unstemmed form;

(b) Any dehydrator shall be deemed to be a packe with respect to raisins dehydrated by him, only if h stems, cleans with water subsequent to such dehydra tion, seeds or packages them for market as raisin;

(c) The committee may, with the approval of th Secretary restrict the exceptions as to permitte cleaning if necessary to cause delivery of sound ra sins; and

(d) No person shall be deemed a packer by reaso of the fact he repackages for market (with or witho additional preparation) packed raisins which, in th

hands of a previous holder, have been inspected and certified as meeting the applicable minimum grade standards for packed raisins.

989.15 Handler.

Handler means: (a) Any processor or packer; (b) any person who places, ships, or continues natural condition raisins in the current of commerce from within the area to any point outside thereof; (c) any person who delivers off-grade raisins, other failing raisins or raisin residual material to other than a packer or other than into any eligible non-normal outlet; or (d) any person who blends raisins: *Provided*, That blending shall not cause a person not otherwise a handler to be a handler on account of such blending if he is either: (1) A producer who, in his capacity as a producer, blends raisins entirely of his own production in the course of his usual and customary practices of preparing raisins for delivery to processors, packers, or dehydrators; (2) a person who blends raisins after they have been placed in trade channels by a packer with other such raisins in trade channels; or (3) a dehydrator who, in his capacity as a dehydrator, blends raisins entirely of his own manufacture.

989.16 Blend.

Blend means to mix or commingle raisins.

989.17 Acquire.

Acquire means to have or obtain physical possession of raisins by a handler at his packing or processing plant or at any other established receiving

station operated by him: *Provided*, That a handler shall not be deemed to acquire any raisins (including raisins produced or dehydrated by him) while:

(a) He stores them for another person or as handler-produced tonnage in compliance with the provisions of §§ 989.58 and 989.70;

(b) He reconditions them, or;

(c) He has them in his possession for the purpose of inspection; and *Provided further*, That the term shall apply only to the handler who first acquires the raisins.

989.18 Committee.

Committee means the Raisin Administrative Committee established under § 989.26.

989.20 Ton.

Ton means a short ton of 2,000 pounds.

989.21 Crop year.

Crop year means the 12-month period beginning with August 1 of any year and ending with July 31 of the following year.

989.22 District.

District means any one of the geographical areas referred to in § 989.26, and designated in the rules and regulations.

989.23 File.

File means transmit or deliver to the Secretary or committee, as the case may be, and such act shall be deemed to have been accomplished at the time:

(a) Of actual receipt by the Secretary or committee in the event of personal delivery;

(b) Of receipt at the office of the telegraph company, in case submission is by telegram; or

(c) Shown by the postmark, in case submission is by mail.

989.24 Standard raisins, off-grade raisins, other failing raisins, and raisin residual material.

(a) *Standard raisins* means raisins which meet the then effective minimum grade and condition standards for natural condition raisins.

(b) *Offgrade raisins* means raisins which do not meet the then effective minimum grade and condition standards for natural condition raisins: *Provided*, That raisins which are certified as off-grade raisins shall continue to be such until successfully reconditioned or become "other failing raisins."

(c) *Other failing raisins* means any raisins received or acquired by a handler, either as standard raisins or off-grade raisins, which are processed to a point where they qualify as packed raisins but fail to meet the applicable minimum grade standards for packed raisins.

(d) *Raisin residual material* means defective raisins, stemmer waste, sweepings, and other residue

accumulated by a handler from reconditioning raisins or from processing standard raisins and other failing raisins.

989.24a Non-normal outlets.

Non-normal outlets means outlets other than those customarily used for commercial disposition of raisins meeting the then applicable minimum standards for natural condition raisins or packed raisins.

989.25 Part and subpart.

Part means the order regulating the handling of raisins produced from grapes grown in California, and all rules, regulations, and supplementary orders issued thereunder. This order regulating the handling of raisins produced from grapes grown in California shall be a *subpart* of such part.

RAISIN ADMINISTRATIVE COMMITTEE

989.26 Establishment and membership.

A Raisin Administrative Committee is hereby established consisting of 47 members of whom 35 shall represent producers, 10 shall represent handlers, 1 shall represent the cooperative bargaining association(s) and 1 shall be a public member. The producer members shall be selected as follows:

(a) Producer members representing the cooperative marketing association(s) shall be members of such association(s) engaged in the handling of raisins, each of which acquired not less than 10 percent of the total raisin acquisitions during the preceding crop year, and those members shall be equal to the product, rounded

to the nearest whole number, obtained by multiplying 35 by the ratio the cooperative marketing association(s) raisin acquisitions are to the acquisitions of all handlers during the preceding crop year.

(b) Producer members representing cooperative bargaining association(s) shall be members of such associations, and the number of those members shall be equal to the product, rounded to the nearest whole number, obtained by multiplying 35 by the ratio the raisins acquired by handlers from bargaining association members are to the total acquisitions of all handlers during the preceding crop year.

(c) All other producer members who shall not be members of a cooperative bargaining association(s), cooperative marketing association(s) engaged in the handling of raisins which acquired 10 percent or more of the total acquisitions during the preceding crop year, nor sold for cash to cooperative marketing association(s), shall represent all producers not defined in paragraph (a) or (b) of this section and shall be selected in the number and, when appropriate, for the districts as designated in the rules and regulations.

(d) The handler members shall be divided into two groups and include the following:

(1) Handler members shall be selected from and represent cooperative marketing association(s) engaged in the handling of raisins each of which acquired not less than 10 percent of the total raisin acquisitions during the preceding crop year, and the number of those members shall be equal to the product, rounded to the nearest whole number, obtained by multiplying

10 by the ratio of the cooperative marketing association(s) raisin acquisitions are to the total acquisitions of all handlers during the preceding crop year.

(2) The remaining handler members shall be selected from and represent all other handlers, which would include all independent handlers and small cooperative marketing association(s) who acquired less than 10 percent of the total raisin acquisitions during the preceding crop year. Handler nominees for this group shall be nominated by all handlers in the group in a manner determined by the Committee, with the approval of the Secretary, and specified in the rules and regulations.

(e) The "cooperative" bargaining association'(s) member shall be selected from the cooperative bargaining association(s). The public member shall be nominated by the Committee and selected by the Secretary as public member.

(f) For each member of the Committee there shall be an alternate member who shall have the same qualifications as the member for whom he is an alternate.

989.27 Eligibility.

No person shall be selected or continue to serve as a member or alternate member of the Committee who is not actively engaged in the business of the group which he represents either in his own behalf, or as an officer, agent, or employee of a business unit engaged in such business: *Provided*, That only producers, as defined in § 989.11, engaged as such with respect to the most recent grape crop, are eligible to serve on the

Committee. Only handlers who packed or processed raisins during the then current crop year shall be eligible to represent handlers on the Committee. Any handler eligible to represent a particular group shall continue to represent handlers for the entire term for which he was selected.

989.28 Term of office.

The term of office of all representatives serving on the Committee shall be for two years and shall end on April 30 of even numbered calendar years, but each such member and alternate member shall continue to serve until their successor is selected and has qualified.

989.29 Initial members and nomination of successor members.

(a) *Initial members.* Members and alternate members of the Committee serving immediately prior to the effective date of this amended subpart shall, if thereafter they are eligible, serve on the Committee until April 30, 1984, and until their respective successors have been selected and qualified.

(b) *Nominations for successor members.* Nominations for successor members and alternate members of the Committee shall be made as follows:

(1) The Committee shall notify the cooperative marketing association(s) engaged in handling not less than 10 percent of the total raisin acquisitions during the preceding crop year, and cooperative bargaining association(s), of the date by which nominations to fill member and alternate member positions shall be

made. The Committee shall give reasonable publicity of a meeting or meetings of producers who are not members of cooperative bargaining association(s), or cooperative marketing association(s) which handled 10 percent or more of the total raisin acquisitions during the preceding crop year, and of independent handlers and cooperative marketing association(s) who handled less than 10 percent of the total raisin acquisitions during the preceding crop year, for the purpose of making nominations to fill the member and alternate member positions prescribed in § 989.26 (c) and (d): *Provided*, That member and alternate member nominations by independent handlers and cooperative marketing association(s) who acquired less than 10 percent of the total raisin acquisitions during the preceding crop year may be made to the Committee by mail in lieu of meetings.

(2)(i) Any producer representing independent producer and producers who are affiliated with cooperative marketing association(s) handling less than 10 percent of the total raisin acquisitions during the preceding crop year must have produced grapes which were made into raisins in the particular district for which they are nominated to represent said district as a producer member or alternate producer member on the committee. In the event any such nominee is engaged as a producer in more than one district, such producer may be a nominee for only one district. One or more producers may be nominated for each such producer member or alternate member position.

(ii) Each such producer whose name is offered in nomination shall be given the opportunity to provide the committee a short statement outlining qualifications and desire to represent on the committee independent producers or producers who are affiliated with cooperative marketing association(s) handling less than 10 percent of the total raisin acquisitions during the preceding crop year. These brief statements, together with a ballot and voting instructions, shall be mailed to all independent producers and producers who are affiliated with cooperative marketing associations handling less than 10 percent of the total raisin acquisitions during the preceding crop year of record with the committee in each district. The producer receiving the highest number of votes shall be designated as the first member nominee, the second highest shall be designated as the second member nominee or alternate member nominee, as the case may be, until nominees for all member and alternate member positions have been filled.

(iii) Each independent producers or producers affiliated with cooperative marketing association(s) handling less than 10 percent of the total raisin acquisitions during the preceding crop year shall cast only one vote with respect to each position for which nominations are to be made. Write-in candidates shall be accepted. The person receiving the most votes with respect to each position to be filled, in accordance with paragraph (b)(2)(ii) of this section, shall be the person to be certified to the Secretary as the nominee. The committee may, subject to the approval of the Secre-

tary, establish rules and regulations to effectuate this section.

(3) One or more eligible handlers for each handler position to be filled may be proposed for nomination to represent independent handlers and cooperative marketing association(s) which acquired less than 10 percent of the total raisin acquisitions during the preceding crop year on the Committee. Nominations shall be made by and from handlers, or employees, representatives or agents of handlers falling within such groups. Each handler shall cast only one vote with respect to each position for which nomination is to be made. The person receiving the most votes with respect to each handler member of handler alternate member position shall be the person to be certified to the Secretary as the nominee for each such position.

(4) Each vote cast shall be on behalf of the person voting, the person's agent, subsidiaries, affiliates, and representatives. Voting at each handler meeting shall be in person. The results of each ballot at each handler meeting shall be announced at that meeting.

(5) Each nomination shall be certified by the Committee to the Secretary on or before April 5 immediately preceding the commencement of the term of office of the member or alternate member position for which the nomination is certified.

989.30 Selection.

The Secretary shall select producer, handler, cooperative bargaining association(s), and public members and alternate members in the number specified in

989.26, as applicable, and with the qualifications specified in § 989.27. Such selections may be made from nominations certified pursuant to § 989.29 or from other eligible producers, handlers, or cooperative bargaining association(s) officers or employees.

989.31 Failure to nominate.

In the event nomination for a member or alternate member position on the committee is not certified pursuant to and within the time specified in § 989.29, the Secretary may select an eligible person to fill such position without regard to nomination.

989.32 Acceptance.

Each person to be selected by the Secretary as a member or as an alternate member of the Committee shall, prior to such selection, qualify by advising the Secretary that he/she agrees to serve in the position for which nominated for selection.

989.33 Alternate members.

The alternate for a member of the committee shall act in the place and stead of such member (a) during his absence, and (b) in the event of his removal, resignation, disqualification, or death, until a successor for such member's unexpired term has been selected and has qualified.

989.34 Vacancies.

To fill any vacancy occasioned by the failure of any person selected as a member or as an alternate member of the committee to qualify, or in the event of the removal, resignation, disqualification, or death of any

member or alternate member, a successor for such person's unexpired term shall be nominated and selected in the manner set forth in §§ 989.29 and 989.30, insofar as such provisions are applicable. If nomination to fill any vacancy is not filed within 40 calendar days after such vacancy occurs, the Secretary may select an eligible person to fill such vacancy without regard to nomination.

989.35 Powers.

The committee shall have the following powers:

(a) To administer the terms and provisions of this part;

(b) To make rules and regulations to effectuate the terms and provisions of this part;

(c) To recommend to the Secretary amendments to this part; and

(d) To receive, investigate, and report to the Secretary complaints of violations of this part.

989.36 Duties.

The committee shall have, among others, the following duties:

(a) To act as intermediary between the Secretary and any producer, packer, dehydrator, processor or cooperative bargaining association;

(b) To investigate compliance and to use means available to it to prevent violations of this part;

(c) To keep minutes, books, and other records, which shall clearly reflect all of its acts and transac-

tions, and such minutes, books, and other records shall be subject to examination by the Secretary at any time;

(d) To investigate and assemble data on the production, handling and market conditions with respect to raisins;

(e) To submit to the Secretary such available information with respect to raisins and grapes as he may request, and such other information as the committee may deem desirable and pertinent;

(f) To select from among its members a chairman and other officers, and to adopt such rules and regulations for the conduct of its business as it may deem advisable;

(g) To appoint or employ such other persons as it may deem necessary, and to determine the salaries and define the duties of each such person;

(h) To cause the books of the committee to be audited by certified public accountants at least once each year, or at such other times as the committee may deem necessary or as the Secretary may request, and the report of each such audit shall show, among other things, the receipts and expenditures of funds, and at least two copies of each such audit shall be submitted to the Secretary;

(i) To prepare quarterly statements of its financial operations and make such statements, together with the minutes of its meetings, available at the office of the committee for inspection by producers, handlers and dehydrators;

(j) To give reasonable advance notice of the times, places, and purposes of its meetings by mail or other appropriate means to each member and alternate member and such notice shall be given as widespread publicity as is practicable;

(k) To conduct meetings for the purpose of making nominations for membership on the committee and the certifying of nominations made for such purposes to the Secretary;

(*l*) To establish, with the approval of the Secretary, such rules and procedures relative to administration of this subpart as may be consistent with the provisions contained in this subpart and as may be necessary to accomplish the purposes of the act and the efficient administration of this subpart.

989.37 Obligation.

Upon the removal, resignation, disqualification, or expiration of the term of office of any member or alternate member, such member or alternate member shall account for all receipts and disbursements and deliver to his successor, to the committee, or to a designee of the Secretary all property (including, but not limited to, all books and records) in his possession or under his control as member or alternate member, and he shall execute such assignments and other instruments as may be necessary or appropriate to vest in such successor, committee, or designee full title to such property and funds, and all claims vested in such member or alternate member. Upon the death of any member or alternate member of the committee, full title to such property, funds, and claims vested in such

member or alternate member shall be vested in his successor or, until such successor has been selected and has qualified, in the committee.

989.38 Procedure.

The Committee shall meet at the call of the chairman, or vice-chairman when acting as chairman, or at the call of any three members. All decisions of the Committee reached shall be by majority vote of the members present. All votes shall be cast in person and a quorum must be present. The presence of 25 members shall be required to constitute a quorum. The Committee shall give to the Secretary the same notice of meetings of the Committee as it gives to its members.

989.39 Compensation and expenses.

The members and alternate members of the committee shall serve without compensation, but shall be allowed their necessary expenses as approved by the committee.

989.53 Research and development.

(a) *General.* The Committee, with the approval of the Secretary, may establish or provide for the establishment of projects involving marketing research and development and marketing promotion including paid advertising, designed to assist, improve, or promote the marketing, distribution, and consumption of raisins in domestic and foreign markets. These projects may include, but need not be limited to those designed to:

(1) Improve through research the accuracy of raisin production estimates;

(2) Improve through research the preparation for market, sanitation, quality, condition, storability, processing, or packaging of raisins;

(3) Ascertain through research the factors affecting acceptance of raisins by manufacturers or consumers;

(4) Promote the marketing, distribution, or consumption of raisins in domestic and foreign markets by collecting data thereon, consulting with members of the trade, and making the information available to producers, handlers, and exporters; and

(5) Promote the marketing, distribution, or consumption of raisins in foreign markets through the use of merchandising programs.

The expense of any such project relating solely to free tonnage raisins shall be paid from funds collected pursuant to § 989.80. The expense of any such project relating solely to reserve tonnage raisins shall be paid from the sale proceeds of such raisins. If any such project encompasses both free tonnage and reserve tonnage raisins, such as one which is designed to promote the consumption in export outlets of raisins generally on a long-term basis, the expense of the project may be allocated between the assessment fund and the pool fund.

(b) *Creditable expenditures.* The Committee, with the approval of the Secretary, may provide for crediting all or any portion of a handler's direct expenditures for marketing promotion, including paid advertising,

that promotes the sale of raisins, raisin products, or their use. No handler shall receive credit for any allowable direct expenditures that would exceed the total of his assessment obligation which is attributable to that portion of his assessment designated for marketing promotion including paid advertising.

(c) *Criteria.* Before any project involving marketing promotion, including paid advertising, and the crediting of the handler's pro rata expense assessment obligation of handlers is undertaken pursuant to this section, the Secretary after recommendation by the Committee, shall approve appropriate criteria to effectively regulate such activity.

MARKETING POLICY

989.54 Marketing policy.

(a) *Trade demand.* On or before August 15 of each crop year, the Committee shall hold a meeting to review shipment data, inventory data, and other matters relating to the quantity of raisins of all varietal types. For any varietal type for which a free tonnage percentage may be recommended, the Committee shall compute a trade demand. The trade demand shall be 90 percent of the prior crop year's shipments (converted to a natural condition weight) of free tonnage and reserve tonnage sold for free use for that varietal type, into all market outlets, adjusted by the carryin on August 1 of the current crop year and the desirable carryout for the varietal type at the end of that crop year. If the prior year's shipments were limited because of crop conditions, the Committee may select the shipments of one of the three years preceding the

prior crop year. The desirable carryout shall be increased from 45,000 to 60,000 tons for Natural (sun-dried) Seedless raisins at a rate of 5,000 tons per year for three crop years following the effective date of this amended subpart. The desirable carryout for Dipped Seedless raisins shall be 1,500 tons, and for Oleate and Related Seedless raisins, 1,500 tons. The trade demand computed by the Committee shall be announced by the Committee in accordance with paragraph (h) of this section.

(b) *Preliminary percentages.* On or before October 5 of each crop year (except that the Committee may extend this date not more than five business days if warranted by a late crop), the Committee shall estimate the production of any varietal type of raisins for which it has computed a trade demand. If the Committee determines that volume regulation is desirable during the crop year for that varietal type, it shall compute and announce preliminary free and reserve percentages for that varietal type: *Provided*, That such production estimate shall include by varietal type the raisins handlers are expected to acquire from producers and the total tonnage of raisins diverted under a raisin diversion program. The Committee shall compute a preliminary free percentage to release 85 percent of the computed trade demand, if it determines that a field price has been established for that varietal type, or 65 percent of the trade demand if no field price has been established. The preliminary free percentage shall be computed by multiplying the trade demand by either 85 percent or 65 percent (as the case may be) and dividing the product by the esti-

mated production of that varietal type and rounding the resulting percentage to the nearest full percent. The difference between 100 percent and the preliminary free percentage shall be the preliminary reserve percentage.

(c) *Interim percentages.* Prior to February 15, the Committee may modify the preliminary free and reserve percentages to release less than the trade demand.

(d) *Final percentages.* No later than February 15, the Committee shall recommend to the Secretary, final free and reserve percentages which will tend to release the full trade demand for any varietal type for which preliminary or interim percentages have been computed and announced. The difference between any final free percentage designated by the Secretary and 100 percent shall be the final reserve percentage. With its recommendation, the committee shall report on its consideration of the factors in paragraph (e) of this section.

(e) *Factors.* When computing preliminary and interim percentages, or determining final percentages for recommendation to the Secretary, the Committee shall give consideration to the following factors:

(1) The estimated tonnage held by producers, handlers, and for the account of the Committee at the beginning of the crop year;

(2) The expected general quality and any modifications of the minimum grade standards;

(3) The estimated tonnage of standard and off-grade raisins which will be produced;

(4) If different than the computed trade demand, the estimated trade demand for raisins in free tonnage outlets;

(5) If not estimated as provided in paragraph (a) of this section, an estimated desirable carryout at the end of the crop year for free tonnage and, if applicable, for reserve tonnage;

(6) The estimated market requirements for raisins outside free tonnage outlets, considering the estimated world raisin supply and demand situation;

(7) Current prices being received and the probable general level of prices to be received for raisins by producers and handlers;

(8) The trend and level of consumer income;

(9) Any prohibition of trade practices, pursuant to § 989.62 intended for the crop year; and

(10) Any other pertinent factors bearing on the marketing of raisins including the estimated supply of and demand for other varietal types and regulations applicable thereto.

(f) *Modification.* In the event the Committee subsequently deems it advisable to modify its marketing policy on any crop, because of national emergency, crop failure, or other major change in economic conditions, it shall hold a meeting for that purpose, and file a report thereof with the Secretary within 5 days (exclusive of Saturdays, Sundays, and holidays) after the

holding of such meeting, which report shall show such modification and the basis therefor.

(g) *Reserve tonnage to sell as free tonnage.* On or before November 15 of the crop year, the Committee shall make two simultaneous offers of reserve tonnage to handlers to sell as free tonnage for each varietal type for which preliminary percentages have been computed and announced. One offer shall consist of a quantity equal to 10 percent of the prior year's (or the alternative year selected by the Committee pursuant to paragraph (a) of this section) shipments of free tonnage and reserve tonnage sold for free use into all market outlets to equate the current year's supply with the prior year's shipments. This offer shall be allocated to handlers on the basis of their prior year's acquisitions. The second offer, to provide for market expansion, shall consist of a quantity equal to 10 percent of the prior year's (or the alternative year selected by the Committee pursuant to paragraph (a) of this section) shipments of free tonnage and reserve tonnage sold for free use. This offer shall be allocated to handlers on the basis of their prior year's shipments of free tonnage and reserve tonnage sold for free use. Each offer shall be open to handlers not more than five business days, and subsequently, two offers of any tonnage unsold in the original offers open not more than two business days each, may be made. The reoffer tonnage shall be allocated to handlers who purchase 100 percent of their allocation in preceding offers, and shall be on the basis of the quantity each handler purchased, as a percentage of the total quantity purchased by all handlers eligible to participate.

At the close of the second reoffer, any remaining tonnage may be offered to handlers who purchased all of their allocations from previous offers on a first-come first-served basis and such offer shall be open to handlers for one business day. Any handler who had no shipments or acquisitions of raisins during the prior crop year will be allocated raisins under these offers on the basis of his acquisition (up to the time the original offer is made) of raisins in the current crop year. If field prices are not established, the offer shall be made not more than fifteen days following such establishment. The price of reserve tonnage raisins offered to handlers to sell as free tonnage, pursuant to this paragraph, shall be the established field price for free tonnage raisins of that varietal type, plus 3 percent of the established field price, plus the estimated costs incurred by the Committee for equity holders.

(h) *Publicity.* The Committee shall promptly give reasonable publicity to producers, dehydrators, handlers, and the cooperative bargaining association(s) of each meeting to consider a marketing policy or any modification thereof, and each such meeting shall be open to them. Similar publicity shall be given to producers, dehydrators, handlers, and the cooperative bargaining association(s) of each marketing policy report or modification thereof, filed with the Secretary and of the Secretary's action thereon. Copies of all marketing policy reports shall be maintained in the office of the Committee, where they shall be made available for examination by any producer, dehydrator handler, or cooperative bargaining association representative. The Committee shall notify handlers

dehydrators and the cooperative bargaining association(s), and give reasonable publicity to producers of its computation of the trade demand, preliminary percentages, and interim percentages and shall notify handlers, dehydrators, and the cooperative bargaining association(s) of the Secretary's action on percentages by registered or certified mail.

989.55 Regulation by the Secretary.

Whenever the Secretary finds, from the recommendation and supporting information supplied by the Committee or from other available information, that to designate final free and reserve percentages for any varietal type of standard raisins acquired by handlers, during the crop year will tend to effectuate the declared policy of the Act, the Secretary shall designate such percentages. In the event the Secretary finds that suspension or termination of any percentages computed by the Committee or designated by the Secretary tend to effectuate the declared policy of the Act, the Secretary shall suspend or terminate such percentages.

989.56 Raisin diversion program.

(a) *Announcement of program.* On or before November 30 of each crop year, the committee shall hold a meeting to review production data, supply data, demand data, including anticipated demand to all potential market outlets, desirable carryout inventory, and other matters relating to the quantity of raisins of all varietal types. When the committee determines that raisins exist in the reserve pool in excess of projected market needs for any varietal type, it may an-

nounce the amount of such tonnage eligible for diversion during the subsequent crop year. At the same time, the committee shall determine and announce to producers, handlers, and the cooperative bargaining association(s) the allowable harvest cost to be applicable to such diversion tonnage. A production cap of 2.75 tons of raisins per acre shall be established for any production unit approved for participation in a diversion program. The committee, with the approval of the Secretary, may recommend, at the same time that the diversion tonnage for that season is announced, a change in the production cap for that season's diversion program of less than 2.75 tons per acre for any production unit approved for the diversion program.

(b) *Voluntary diversion.* No producer shall be required to participate in any raisin diversion program.

(c) *Issuance of diversion certificates.* After the committee announces a raisin diversion program, any producer may divert grapes of the producer's own production and receive from the committee a diversion certificate in accordance with the applicable rules and regulations. Such certificates may only be submitted by producers to handlers in accordance with applicable rules and regulations. Diversion certificates issued by the committee shall apply to a specific production unit and shall be equal to the creditable fruit weight, not to exceed the production cap established pursuant to paragraph (a) of this section, of such raisins produced on such unit during the prior crop year or the

last prior crop year eligible for such diversion: *Provided*, That in the case of a production unit, or partial production unit, removed from production through vine removal or other means established by the committee, the committee may issue a diversion certificate in an amount greater than the creditable fruit weight of the raisins produced therein or the production cap applicable.

(d) *Redemption of diversion certificates.* Handlers may redeem diversion certificates for reserve pool raisins. To redeem a certificate, a handler must present the diversion certificate to the Committee and pay the Committee an amount equal to the harvest cost it has established, plus an amount equal to the payment for receiving, storing, fumigating, handling, and inspecting reserve tonnage raisins specified in § 989.401 for the entire tonnage represented on the certificate. Upon receipt of the diversion certificate, the Committee shall note on the certificate that it is cancelled.

(e) *Implementation of the program.* The Committee shall establish, with the approval of the Secretary, such rules and regulations as may be necessary for the implementation and operation of a raisin diversion program.

9. 7 C.F.R. 989.65 through 989.95 provide:

989.65 Free and reserve tonnage.

The standard raisins acquired by handlers which are free tonnage, and any reserve tonnage purchased

for free use, may be disposed of by him in any marketing channel, subject to the applicable provisions of this part. A handler's free tonnage of a varietal type of raisin shall be either the free percentage of the standard raisins of the varietal type acquired by him or all of the standard raisins of the varietal type acquired by him if no free percentage is established by the Committee or designated by the Secretary for that varietal type. A handler's reserve tonnage of a varietal type shall be the reserve percentage of the standard raisins of that varietal type acquired by him.

989.66 Reserve tonnage generally.

(a) The standard raisins acquired by a handler which are designated as reserve tonnage and reserve tonnage transferred to a handler by the committee shall be held by him for the account of the committee and subject to the applicable restrictions of this part.

(b)(1) Each handler shall hold in storage all reserve tonnage acquired by him and all reserve tonnage transferred to him by the committee until he has been relieved of such responsibility by the committee either by delivery to the committee or otherwise. Such handler shall store such reserve tonnage raisins in natural condition without addition of moisture and in such manner as will maintain the raisins in the same condition as when he acquired them, except for normal and natural deterioration and shrinkage, and except for loss through fire, acts of God or other conditions beyond the handler's control.

(2) Reserve tonnage acquired by a handler or transferred to a handler by the committee shall be

stored separate and apart from other raisins to such extent and identified in such manner as the committee shall specify in its rules and procedures with the approval of the Secretary.

(3) Each handler may, under the direction and supervision of the committee, substitute for any reserve tonnage raisins a like quantity of standard raisins of the same varietal type and of the same or more recent year's production. Each such handler shall give the committee reasonable advance notice of his intention to substitute, the exact location of the raisins for which substitution is to be made, and arrange with the committee a mutually satisfactory time for the substitution.

(4) The committee may, after giving reasonable notice, require a handler to deliver to it, or to anyone designated by it, at such handler's warehouse or at such other place as the raisins may be stored, part or all of the reserve tonnage raisins held by such handler. Reserve tonnage raisins delivered by any handler to the committee, or to any person designated by it, in the form of natural condition raisins shall in the aggregate be not more than 2 percent less than the average maturity level of all raisins such handler acquired during the applicable crop year. The committee may require that such delivery consist of natural condition raisins, or it may arrange for such delivery to consist of packed raisins.

(c) Each handler shall, at all times, hold in his possession or under his control reserve tonnage referable to his acquisitions of standard raisins and reserve

tonnage transferred to him by the committee, less any quantity of such reserve tonnage released to him by a change of percentages, delivered by him pursuant to instructions of the committee or sold to him by the committee.

(d) Reserve tonnage raisins delivered by any handler to the committee, or to any person designated by it, whether in the form of natural condition raisins or packed raisins shall meet the applicable minimum grade or grade and condition standards, except for normal and natural deterioration. The committee shall have the authority to require, in its discretion and at its expense, such reinspection and certification of reserve pool tonnage raisins as it may deem necessary.

(e) In the event the committee offers to handlers reserve tonnage raisins for contract packing or for sale in export, as provided in § 989.67, each handler shall be given the opportunity to pack or purchase his share of each offer.

(f) Handlers shall be compensated for receiving, storing, fumigating, handling, and inspection of that tonnage of reserve raisins determined by the reserve percentage of a crop year and held by them for the account of the committee, in accordance with a schedule of payments established by the committee and approved by the Secretary. A box rental shall be paid by the committee to producers or handlers for boxes used in storing reserve tonnage raisins beyond the crop year of acquisition in accordance with a rental schedule established by the committee and approved by the Secretary. The handler compensation shall be

reviewed annually and shall be paid, as to the amount determined to be earned and unpaid, as soon as practicable after the end of the second quarter of the crop year and quarterly thereafter. Any handler may request the committee, by registered or certified mail, at any time after June 1 of a crop year to remove or relocate reserve tonnage raisins of the current crop year which remain in his possession. At any time during a crop year, a handler may request removal or relocation of reserve tonnage of a prior crop year. In each instance, he may request that the committee provide the necessary containers for any such removal or relocation. When so requested as to current crop year raisins, the committee shall make the removal or relocation, the availability of containers, storage space and time of request permitting, by September 15 of the subsequent crop year, and as to raisins of the prior crop year, within 30 days, supplying the necessary containers if so requested. If the committee removes or relocates reserve raisins of the current crop year pursuant to a handler's request, and such raisins are released to him by September 15 of the subsequent crop year, the handler shall reimburse the committee for any costs incurred by it in such removal or relocation. If any handler requests removal or relocation of reserve raisins, the committee shall immediately give notice thereof to the Secretary.

(g) The committee shall have the authority, in its discretion, to obtain loans, nonrecourse or otherwise, on any part of the reserve tonnage not subject to release as desirable free tonnage and to pledge or hypothecate the raisins on which such loans are obtained

as security therefor: *Provided*, That in every such case, there shall be included in the loan agreement a provision to the effect that, in case the lender obtains possession or control of such raisins, he will dispose of them in such a manner as will not tend to defeat the objectives of this amended subpart. The net proceeds of any such loan shall be distributed by the committee pursuant to paragraph (h) of this section.

(h) The net proceeds from the disposition of reserve tonnage raisins of any varietal type shall be distributed by the committee to the respective producers, or their successor in interest thereto, on the basis of the volume of their respective contributions to the reserve tonnage of such varietal type. Distribution of the proceeds in connection with the reserve tonnage contributed by a nonprofit cooperative marketing association which has authority to market the raisins of its members and to allocate the proceeds therefrom to such members shall be made to such association. Advance or progress payments may be made by the committee, in conformity with the provisions of this paragraph, as sufficient funds become available.

989.67 Disposal of reserve raisins.

(a) At the time the committee meets to consider free and reserve percentages for a crop year, the committee shall consider the marketing of reserve tonnage raisins for the subsequent 12-month period. The committee shall dispose of all reserve tonnage in such manner as to achieve, as nearly as may be practicable, maximum disposal of such raisins by the time reserve tonnage raisins from the subsequent crop year

are available. Any reserve tonnage raisins held unsold by the committee on May 1 of the subsequent crop year shall be physically disposed of promptly in any available outlet not competitive with normal market channels for free tonnage raisins or sales of new crop reserve tonnage raisins in export: *Provided*, That, whenever the Secretary finds, based upon a recommendation of the committee, or on the basis of information otherwise available to him that because of national emergency, crop failure, an insufficient supply of reserve tonnage raisins for export, or other change of economic or marketing conditions, retention of reserve tonnage raisins carried over is warranted, the foregoing requirements as to disposal shall not apply and such raisins may be disposed of in any outlet recommended by the committee and approved by the Secretary.

(b) Reserve tonnage raisins shall be disposed of by the committee:

(1) By sale to handlers for sale in specified outlets or for resale to exporters for sale in export outlets;

(2) By direct sale to any agency of the U.S. Government for noncompetitive use;

(3) By direct sale to foreign government agencies or foreign importers in any country not listed pursuant to paragraph (c) of this section or where the procurement of raisins is so regulated as to preclude purchases from domestic handlers;

(4) By gift; and

(5) By any other means consistent with the provisions of this section, and in outlets noncompetitive with those for free tonnage raisins.

(c) The committee shall sell reserve raisins to handlers for export sale to countries on a list established by the Secretary, on the basis of the recommendation of the committee or from other available information. The list of countries shall be reviewed by the committee annually when it reviews matters relating to the free tonnage, and shall recommend any changes in the list to the Secretary for approval. No country may be removed from the list for the purpose of permitting direct sale by the committee unless a finding is made by the committee and approved by the Secretary, that such removal and subsequent direct sale by the committee shall not lead to disruption of sale of reserve tonnage raisins by handlers in other countries on the list, and that although handlers have been able to offer reserve tonnage raisins at competitive prices to the country to be so removed, there remains an unfilled demand in such country which has not been supplied by handlers and which could be supplied by the committee at the same prices by means of direct sale.

(d)(1) Reserve tonnage raisins shall be sold to handlers at prices and in a manner intended to maximum producer returns and achieve maximum disposition of such raisins by the time reserve tonnage raisins from the subsequent crop year are available. The committee may pay the cost of transporting reserve tonnage from one handler to another and in the event a handler has more than one plant, the committee may

pay the cost of transporting reserve tonnage to the handler's plant of its choice. In each offer or reoffer of reserve tonnage raisins for export, the committee may include a quantity of raisins not to exceed 2 percent of the total tonnage offered in such offer or reoffer, which it may sell to handlers whose regular allocation provides insufficient tonnage to fill a containerized freight shipping container: *Provided*, That such sale may be made only when the remaining portion of a handler's regular allocation will fill at least 50 percent of such container and shall be made to a handler only one time in each offer or reoffer of reserve tonnage raisins. No offer or reoffer shall be made until 5 days (exclusive of Saturdays, Sundays, and holidays) have elapsed from the time it files with the Secretary complete information as to varietal type, quantity, and price involved in such offer or reoffer, and the Secretary may disapprove the offer or reoffer or any term thereof: *Provided*, That at any time prior to the expiration of the 5-day period, the offer or reoffer may be made to handlers upon the committee receiving from the Secretary notice that he does not disapprove the making of the offer or reoffer. Subject to the same conditions as are set forth in the preceding sentence with respect to the making of such offer or reoffer, the committee may withdraw an offer or reoffer to sell reserve tonnage raisins to handlers or may extend the offer or reoffer period but not when such extension would deprive one or more handlers of an opportunity to purchase raisins.

(2) Except for the final offer of the reserve tonnage from a crop year, an offer of reserve tonnage raisins

for export shall provide for a specific tonnage. Each handler's share of the reserve tonnage offered prior to November 1 of any crop year shall be determined as the same proportion of the quantity offered that the free tonnage raisins acquired by him during the preceding crop year is of the free tonnage raisins acquired by all handlers during the preceding crop year who remain handlers. If reserve tonnage raisins have been removed by the committee from a handler's premises pursuant to § 989.66(f), such handler's allocation of reserve pool offers subsequent to such removal and prior to November 1 of the following crop year shall be reduced by the percentage such removed reserve tonnage is of the total reserve tonnage acquired by such handler in the crop year. Subsequent to October 31, each handler's share shall be determined as the same proportion of the quantity offered that the free tonnage raisins acquired by the handler during the then current crop year is of the total free tonnage raisins acquired by all handlers during the then current crop year. With respect to any offer other than the initial offer, each handler's share of the total quantity offered as of that date (the then current offer plus all prior offers of that crop year) shall first be determined by the appropriate formula. His share of the current offer shall then be determined by subtracting from his share of the total quantity offered, the total of his share of prior offers from the beginning of the crop year. If any handler did not acquire raisins during the preceding crop year, the basis for his share of any quantity of reserve tonnage raisins offered prior to November 1 shall be his acquisitions of

free tonnage raisins during the then current crop year. The current free tonnage acquisitions of all such new handler shall, for the purposes of determining the shares of all handlers prior to November 1, be added to the total acquisitions of free tonnage raisins during the preceding crop year of all handlers in business at the time the offer is made.

(3) With respect to any offer of reserve tonnage for sale to handlers for resale in export, the committee may provide that any such tonnage unpurchased at the end of the share reservation period will be reoffered to handlers without regard to shares and that approval for handlers' applications for purchase may be made in the same order in which the applications are received by the committee. Such reoffer may be made by the committee at the time it makes a regular offer of reserve tonnage, at any time during the period a regular offer is in effect, or within a reasonable time after a regular offer has expired.

(4) The final offer of the reserve tonnage from a crop year may be offered to handlers without regard to shares and approval of handlers' applications for purchase may be made in the same order in which the applications are received by the committee.

(5) Whenever a handler's share or allocation pursuant to this paragraph is less than or exceeds his holdings of reserve tonnage by a minor quantity, the committee may adjust the handler's share or allocation so as to avoid the cost of the physical transfer. The maximum quantity by which a handler's share or allocation may be so allocated shall be prescribed in rules

and procedures which the committee shall establish with the approval of the Secretary.

(e) The committee may sell reserve tonnage raisins as provided in paragraph (b)(3) of this section only when such country is not included in the list of specified countries established pursuant to paragraph (c) of this section and may sell reserve tonnage raisins to foreign government agencies of foreign importers in any country removed from such list. No agreement to sell reserve tonnage raisins shall be entered into by the committee until 5 days (exclusive of Saturdays, Sundays, and holidays) have elapsed from the time it files with the Secretary complete information as to varietal type, quantity, price and foreign country involved in any such proposed sale, and the Secretary may disapprove such sale or any term thereof: *Provided*, That, at any time prior to the expiration of the 5-day period, the sale may be made upon the committee receiving from the Secretary notice that he does not disapprove the making of the sale.

(f) Whenever the committee concludes that the orderly disposition of reserve tonnage would be promoted by the committee replacing any portion or all of handlers' export shipments of free tonnage raisins, to other than free tonnage outlets, made prior to the committee's first offer to sell reserve tonnage, it may do so and may specify such requirements and conditions as are necessary to carry out the replacement consistent with the objectives of this amended subpart. The committee may establish a price for such replacement tonnage which is higher, the same as, or

lower than that for reserve tonnage in the first offer of the crop year. Any such replacement offer by the committee shall be governed by those provisions of paragraph (d)(1) of this section which prescribe prior action by the Secretary on committee offers to sell tonnage to handlers.

(g)(1) The committee may, subject to review by the Secretary, refuse to sell reserve tonnage raisins for export:

(i) To any handler who is in default on any previous purchase of reserve tonnage raisins from the committee;

(ii) To any handler currently not in compliance with the provisions of a sales agreement covering reserve tonnage raisins, executed by such handler with the committee; or

(iii) To any handler who signifies an intention to sell reserve tonnage to or through any person who has previously failed to complete a sale of reserve tonnage raisins to a foreign buyer and such raisins remain to be exported and remain unsold to any foreign buyer in an eligible export market.

(2) Handlers who are in default of timely payment under any purchase agreement are subject to an interest and late payment charge(s) recommended by the committee and approved by the Secretary on the delinquent amount that is owed the committee. The interest charge shall be the current prime rate plus 2 percent established by the bank in which the committee has its administrative assessment funds deposited.

on the day the amount owed becomes delinquent; and further, that such rate of interest be added to the bill monthly until the handler's delinquent amount owed plus applicable interest has been paid: *Provided*, That the committee, with the approval of the Secretary, may recommend changes in the rate of interest to another rate of interest. When the committee determines to change the rate of interest or a late payment charge is needed, and such change is approved by the Secretary, the committee shall announce the change in the rate of interest or the rate of late payment charge through a mailing by the committee to handlers.

(3) *Appeals.* If a determination is made by the committee that a handler has not complied with the provisions of this section and any actions allowed under this section are taken against the handler, such handler may request a hearing before an appeals subcommittee established by the committee. If the handler disagrees with the subcommittee's decisions, the handler may request the committee to review the subcommittee's decision. The committee may, subject to the approval of the Secretary, establish additional procedures concerning appeals.

(h) Each packer's share of an offer of reserve tonnage raisins for contract packing shall be determined as the same proportion that the reserve tonnage raisins acquired by him is of the reserve tonnage raisins acquired by all packers. In the event that any packer fails to contract for packing any or all of his share of any offer, the remaining portion thereof shall be reoffered by the committee to all packers who con-

tracted for packing all of their respective shares, in proportion to their respective acquisitions: *Provided*, That, if such amount which packers fail to contract for packing does not exceed 250 tons, or if it is necessary to deviate from the foregoing in order to meet terms and conditions of shipment, the committee may, in its discretion, allocate such reserve tonnage raisins among packers as it deems appropriate, but the shares of packers in subsequent offers or reoffers shall be adjusted accordingly.

(i) In the event the committee determines that the applicable procedures as specified in paragraphs (d) and (h) of this section will not provide an allocation for handlers which is suitable for a particular situation, the committee, with the approval of the Secretary, may establish such modifications of procedures, consistent with § 989.66(e), as will facilitate the disposition of reserve tonnage through the handlers.

(j) The committee shall not sell reserve tonnage raisins of any varietal type to handlers to provide them with raisins to sell as free tonnage, other than as provided in § 989.54, unless it files with the Secretary complete information and receives from the Secretary notice that he does not disapprove of such sale and that because of: National emergency, crop failure; change of economic or marketing conditions; free tonnage shipments during the then current crop year exceeding shipments of a comparable period of the prior crop year by more than 5 percent: *Provided*, That, such sale of reserve tonnage shall be limited to the quantity exceeding 105 percent of shipments for

the first 10 months of the prior crop year; and/or an inadequate carryover, the free tonnage outlets cannot be reasonably well supplied by the tonnage released to the industry as a whole by the committee's marketing policy for that varietal type. Any quantities of reserve raisins offered to handlers for free use, except as provided in § 989.54(g), may be offered to them on the basis of handler shipments or acquisitions in the same manner as in paragraph (d)(1) of this section. If offered on the basis of acquisitions, shares shall be determined pursuant to paragraph (d)(2) of this section. If offered on the basis of shipments, the same formula shall be used, except that shipments shall be used as the basis instead of acquisitions in computing handlers' shares. However, such raisins shall not be sold at a price below that which the committee concludes reflects the average price received by producers for free tonnage of the same varietal type purchased by handlers during the current crop year up to the time of any offer for sale of reserve tonnage by the committee, to which shall be added the costs to the equity holders incurred by the committee on account of receiving, inspecting, storing, fumigating, insuring, and holding of said raisins, and including costs of taxes and interest: *Provided*, That, where the outlook for the next crop year or other factors have caused a downward trend in the prices received by producers for free tonnage raisins or in the prices received by handlers for free tonnage packed raisins, reserve tonnage may be sold to handlers at the currently prevailing or the approximate computed field price for free tonnage raisins, as determined by the committee.

The committee may sell reserve tonnage raisins of any varietal type to any handler to provide him with raisins to sell as free tonnage if such handler has lost all or part of his free tonnage because of fire or other disaster beyond his control subject to the applicable provisions of this paragraph and in an amount equal to such tonnage so lost.

989.70 Storage of raisins held on memorandum receipt and of packer-owned tonnage.

All raisins stored by a handler for another person on memorandum or warehouse receipt, or raisins produced and stored by a handler, shall be stored separate and apart from other raisins and shall be clearly marked or tagged as raisins stored on memorandum or warehouse receipt or as raisins produced by the handler but not acquired by him in his capacity as a handler.

989.71 Disposition of unsold reserve tonnage in above parity situations.

In the event that the Secretary should find, during a crop year when reserve tonnage percentages have been designated and are in effect pursuant to this part, that the estimated season average price for raisins for that crop year will be in excess of the price level contemplated by the provisions of section 2(1) of the act, he shall issue an order providing for the orderly disposition of the unsold reserve tonnage then on hand, in such outlets, at such times, and in accordance with such terms and conditions, as he may determine to be appropriate in the circumstances. In determining the liquidation procedures and terms, the Secretary shall

give consideration to the data and recommendations, if any, which may be submitted by the committee.

989.72 Exemption of educational institutions.

The committee may exempt, wholly or in part, from the volume regulation provisions of this part, that volume of raisins received or acquired by public or private educational agencies or institutions incidental to or in connection with teaching, experimental, or research activities.

REPORTS AND RECORDS

989.73 Reports.

(a) *Inventory reports.* Each handler shall, upon request of the committee, file promptly with the committee a certified report, showing such information as the committee shall specify with respect to any raisins which were held by him on a date designated by the committee, which information as specified may include, but not be limited to:

(1) The quantity of any raisins so held, segregated as to varietal type, natural condition, packed, standard quality or off-grade quality; and

(2) The locations of the raisins.

(b) *Acquisition reports.* Each handler shall submit to the committee in accordance with such rules and procedures as are prescribed by the committee, with the approval of the Secretary, certified reports, for such periods as the committee may require, with respect to his acquisitions of each varietal type of raisins during the particular period covered by such report,

which report shall include, but not be limited to: (1) The total quantity of standard raisins acquired; (2) The quantity of reserve tonnage referable to his acquisitions of standard raisins; (3) the locations of such reserve tonnages; (4) the total quantity of off-grade raisins acquired pursuant to § 989.58(e)(1)(i), and (5) cumulative totals of such acquisitions from the beginning of the then current crop year to and including the end of the period for which the report is made. Upon written application made to the committee, a handler may be relieved of submitting such reports after completing his packing operations for the season. Upon request of the committee, each handler shall furnish to the committee, in such manner and at such times as it may require, the name and address of each person from whom he acquired raisins and the quantity of each varietal type of raisins acquired from each such person.

(c) Each handler shall file such reports of creditable promotion including paid advertising as recommended by the Committee and approved by the Secretary.

(d) *Other reports.* Upon the request of the committee, with the approval of the Secretary, each handler shall furnish to the committee such other information as may be necessary to enable it to exercise its powers and perform its duties under this amended part.

989.75 Confidential information.

All reports and records furnished or submitted by a handler to the committee shall be received by, and at

all times kept under the custody or control of, one or more employees of the committee, who shall disclose to no person, except the Secretary upon request therefor, data or information obtained or extracted therefrom which would constitute a trade secret or the disclosure of which might affect the trade position, financial condition, or business operations of the particular handler from whom received: *Providied*, That the committee may require such an employee to disclose to it, or to any person designated by it or by the Secretary, information and data of a general nature, compilations of data affecting handlers as a group, and any data affecting one or more handlers, so long as the identity of the individual handlers involved is not disclosed.

989.76 Records.

Each handler shall maintain such records of all raisins received, and of all raisins acquired, by him as prescribed by the committee. Such records shall include, but not be limited to, the quantity of raisins of each varietal type acquired from each person and the name and address of each such person, total acquisitions, total sales, and total other disposition of each varietal type which he handles, and each handler shall maintain such records for at least two years after the termination of the crop year in which the transactions occurred. The Committee, with the approval of the Secretary, may prescribe rules and regulations to include under this section handler records that detail promotion and advertising activities which the Committee may need to perform its functions under § 989.53.

989.77 Verification of reports and records.

For the purpose of checking and verifying reports filed by handlers and records prescribed in or pursuant to this amended subpart, the committee, through its duly authorized representatives, shall have access to any handler's premises during regular business hours and shall be permitted at any such times to inspect such premises and any raisins held by such handler, and any and all records of the handler with respect to the holding or disposition of raisins by him and promotion and advertising activities conducted by handlers under § 989.53. Each handler shall furnish all labor and equipment necessary to make such inspections. Each handler shall store raisins in a manner which will facilitate inspection, and shall maintain storage records which will permit accurate identification of raisins held by him or theretofore disposed of. Insofar as is practicable and consistent with the carrying out of the provisions of this amended subpart, all data and information obtained or received through checking and verification of reports and records shall be treated as confidential information.

EXPENSES AND ASSESSMENTS

989.79 Expenses.

The committee is authorized to incur such expenses (other than those specified in § 989.82) as the Secretary finds are reasonable and likely to be incurred by it during each crop year, for the maintenance and functioning of the committee and for such purposes as he may, pursuant to this subpart, determine to be appropriate. The funds to cover such expenses shall be

obtained levying assessments as provided in § 989.80. The committee shall file with the Secretary for each crop year a proposed budget of these expenses and a proposal as to the assessment rate to be fixed pursuant to § 989.80, together with a report thereon. Such filing shall be not later than October 5 of the crop year, but this date may be extended by the committee not more than 5 days if warranted by a late crop. Also it shall file at the same time a proposed budget of the expenses likely to be incurred during the crop year in connection with reserve raisins held for the account of the committee, exclusive of the receiving, storing, fumigating, and handling expenses which are covered by a schedule of payments to handlers effective pursuant to § 989.66(f) or any rules and procedures established by the committee, and exclusive of any expenses it may incur in connection with the disposition of such raisins and which are unknown at the time. The said report shall also cover this proposed budget.

989.80 Assessments.

(a) Each handler shall, with respect to free tonnage acquired by him, and any reserve tonnage released or sold to him for use in free tonnage outlets, pay to the committee, upon demand, his pro rata share of the expenses (exclusive of expenses for receiving, fumigating, handling, holding or disposing of reserve pool tonnage) which the Secretary finds will be incurred, as aforesaid, by the committee during each crop year less any amounts credited pursuant to § 989.53. Such handler's pro rata share of such expenses shall be equal to the ratio between the total free tonnage ac-

quired by such handler plus any reserve tonnage released or sold to him for use as free tonnage, during the applicable crop year and the total free tonnage acquired by all handlers plus all reserve tonnage released or sold to all handlers for use as free tonnage, during the same crop year: *Provided*, That (1) in computing the total free tonnage acquired by a particular handler, there shall be excluded all standard raisins (recovered by the reconditioning of offgrade raisins) acquired by the handler and which comprise the assessable portion of another handler pursuant to paragraph (b) of this section, and (2) the computation of the total free tonnage acquired by all handlers shall not be similarly reduced.

(b) Each handler who reconditions offgrade raisins but does not acquire the standard raisins recovered therefrom shall, with respect to his assessable portion of all such standard raisins, pay to the committee, upon demand, his pro rata share of the expenses which the Secretary finds will be incurred by the committee each crop year. Such handler's pro rata share of such expenses shall be equal to the ratio between the handler's assessable portion (which shall be a quantity equal to the free tonnage portions of such handler's standard raisins which are acquired by some other handler or handlers) during the applicable crop year and the total free tonnage acquired by all handlers, plus all reserve tonnage released or sold to all handlers for use as free tonnage, during the same crop year.

(c) During any crop year or any portion of a crop year for which volume percentages are not effective for a varietal type, all standard raisins of that varietal type acquired by handlers during such period shall be free tonnage for purposes of levying assessments pursuant to this section. The Secretary shall fix the rate of assessment to be paid by all handlers on the basis of a specified rate per ton. At any time during or after a crop year, the Secretary may increase the rate of assessment to obtain sufficient funds to cover any later finding by the Secretary relative to the expenses of the committee. Each handler shall pay such additional assessment to the committee upon demand. In order to provide funds to carry out the functions of the committee, the committee may accept advance payments from any handler to be credited toward such assessments as may be levied pursuant to this section against such handler during the crop year. The payment of assessments for the maintenance and functioning of the committee, and for such purposes as the Secretary may pursuant to this subpart determine to be appropriate, may be required under this part throughout the period it is in effect, irrespective of whether particular provisions thereof are suspended or become inoperative.

(d) Each handler shall, with respect to administrative assessments not paid within 30 calendar days of the date of the Committee's invoice, pay to the Committee interest on the unpaid assessment at the rate of the prime rate established by the bank in which the Committee has its administrative assessment funds deposited, on the day that the administrative assess-

ment becomes delinquent plus 2 percent; and further, that such rate of interest be added to the bill monthly until the delinquent handler's assessment plus applicable interest has been paid: *Provided*, That the Committee may, with the approval of the Secretary. modify the interest rate applicable to delinquent handler's assessment through the establishment of applicable rules and regulations.

989.81 Accounting.

(a) If, at the end of the crop year, the assessments collected for such crop year exceed the expenses incurred with respect to such crop year, each handler's share of such excess shall be credited to him against, and may be used for, the operations of the following crop year, unless such handler demands payment thereof, in which case his share shall be paid to him.

(b) The committee may, with the approval of the Secretary, maintain in its own name or in the name of its members, a suit against any handler for the collection of such handler's pro rata share of the expenses.

989.82 Expenses of reserve raisin operations.

The committee is authorized to incur such expenses as are reasonable and are necessary in discharging its obligations, pursuant to this part, with respect to the receiving, fumigating, handling, holding, or disposing of any quantity of reserve pool raisins held for the account of the committee. The committee is authorized to pay any taxes assessed against raisins held by or for the account of the committee on March 1, or such assessment date as later changed and then in

effect, in the reserve pool established pursuant to this subpart: *Provided*, That any equity holder may pay his taxes upon giving notice to the committee on or before May 1 of each year of his intention to do so. All pool expenses shall be deducted from the proceeds obtained by the committee from the sale or other disposal of such reserve raisins held for the account of the committee.

989.83 Funds.

All funds received by the committee pursuant to the provisions of this part, shall be used solely for the purposes authorized, and shall be accounted for in the manner provided, in this part. The Secretary may, at any time, require the committee and its members and alternate members to account for all receipts and disbursements.

MISCELLANEOUS PROVISIONS

989.84 Disposition limitation.

No handler shall dispose of free or reserve tonnage raisins, offgrade raisins, or other failing raisins, except in accordance with the provisions of this subpart or pursuant to regulations issued by the committee.

989.85 Personal liability.

No member or alternate member of the committee or any employee or agent thereof shall be held personally responsible, either individually or jointly with others, in any way whatsoever, to any handler or any person, for errors in judgment, mistakes, or other acts either of commission or omission, as such member,

alternate member, employee, or agent, except for acts of dishonesty.

989.86 Separability.

If any provision of this amended subpart is declared invalid, or the applicability thereof to any person, circumstance, or thing is held invalid, the validity of the remainder of this amended subpart or the applicability thereof to any other person, circumstance, or thing shall not be affected thereby.

989.87 Derogation.

Nothing contained in this amended subpart is, or shall be construed to be, in derogation or in modification of the rights of the Secretary or of the United States to exercise any powers granted by the act or otherwise, or, in accordance with such powers, to act in the premises whenever such action is deemed advisable.

989.88 Duration of immunities.

The benefits, privileges, and immunities conferred upon any person by virtue of this amended subpart shall cease upon the termination of this amended subpart, except with respect to acts done under and during the existence of this subpart.

989.89 Agents.

The Secretary may, by a designation in writing, name any person, including any officer or employee of the United States Government, or name any bureau or division in the United States Department of Agricul-

ture, to act as his agent or representative in connection with any of the provisions of this amended subpart.

989.90 Effective time.

The provisions of this amended subpart, as well as any amendments to this amended subpart shall become effective at such time as the Secretary may declare, and shall continue in force until terminated, or during suspension, in one of the ways specified in § 989.91.

989.91 Suspension or termination.

(a) The Secretary may, at any time, terminate the provisions of this amended subpart by giving at least one day's notice by means of a press release or in any other manner which he may determine.

(b) The Secretary shall terminate or suspend the operation of any or all of the provisions of this amended subpart, whenever he finds that such provisions do not tend to effectuate the declared policy of the act.

(c) The Secretary shall terminate the provisions of this amended subpart at the end of any crop year whenever he finds that such termination is favored by a majority of the producers who, during a representative period determined by the Secretary, have been engaged in the production for market of grapes used in the production of raisins in the State of California: *Provided*, That such majority have, during such representative period, produced for market more than 50 percent of the volume of such grapes produced for market within said State; but such termination shall be

effective only if announced before July 31 of the then current crop year.

(d) The provisions of this amended subpart shall, in any event, terminate whenever the provisions of the act authorizing them cease to be in effect.

989.92 Proceedings after termination.

(a) Upon the termination of the provisions of this amended subpart, the members of the committee then functioning shall continue as joint trustees for the purpose of liquidating the affairs of the committee, of all funds and property then in the possession or under the control of the committee, including claims for any funds unpaid or property not delivered at the time of such termination. Action by said trusteeship shall require the concurrence of a majority of the said trustees.

(b) Said trustees shall continue in such capacity until discharged by the Secretary; shall, from time to time, account for all receipts and disbursements and deliver all property on hand, together with all books and records of the committee and the joint trustees, to such person as the Secretary may direct; and shall, upon the request of the Secretary, execute such assignments or other instruments necessary or appropriate to vest in such person full title and right to all of the funds, property, and claims vested in the committee or the joint trustees pursuant to this subpart.

(c) Any person to whom funds, property or claims have been transferred or delivered by the committee or its members, pursuant to this section, shall be sub-

ject to the same obligations imposed upon the members of the said committee and upon said joint trustees.

989.93 Effect of termination or amendment.

Unless otherwise expressly provided by the Secretary, the termination of this amended subpart or any regulation issued pursuant to this amended subpart, or the issuance of any amendment to either thereof, shall not (a) affect or waive any right, duty, obligation, or liability which shall have arisen or which may thereafter arise in connection with any provision of this amended subpart or any regulation issued under this amended subpart, (b) release or extinguish any violation of this amended subpart, or of any regulation issued under this amended subpart, or (c) affect or impair any rights or remedies of the Secretary or of any other person, with respect to any such violation.

989.94 Amendments.

Amendments to this amended subpart may be proposed from time to time, by any person or by the committee.

989.95 Right of Secretary.

The members of the committee (including alternates and successors) and any agent or employee appointed or employed by the committee, shall be subject to removal or suspension by the Secretary, in his discretion, at any time. Every decision, determination, or other act of the committee shall be subject to the continuing right of the Secretary to disapprove of the same at any time. Upon such disapproval, the disap-

proved action of the committee shall be deemed null and void.

10. 7 C.F.R. 989.166 provides:

Reserve tonnage generally.

(a) *Set-aside obligations*—(1) *Natural (sun-dried) Seedless.* Handlers who acquire any lot of natural condition Natural (sun-dried) Seedless raisins which have been dipped in or sprayed with water, with or without chemicals, prior to or during the drying process, for purposes other than to expedite drying, or that have been produced from seedless varieties of grapes other than Thompson Seedless (i.e., Fiesta, Emerald Seedless, Perlette, Delight, and other similar grape varieties), or that have been treated with Oleate or similar drying agents, or such other Natural (sun-dried) Seedless raisins that have been produced using other cultural practices as recommended by the Committee with the approval of the Secretary, may set aside such raisins to satisfy their reserve pool obligation: *Provided*, That such raisins shall be identified by the Inspection Service affixing to one container on each pallet or to each bin in each lot, a prenumbered RAC control card (to be furnished by the Committee) which shall remain affixed until raisins are processed or disposed of as natural condition raisins: and *Provided further*, That such raisins shall not be delivered to the Committee or transferred to another handler without approval of the Committee or the receiving handler.

(2) *Mixed varietal types.* A handler who acquired any lot of natural condition raisins of mixed varietal types (commingled within their containers) shall meet the reserve tonnage setaside obligation for each varietal type contained in the mixed lot by setting aside raisins of each such varietal type which have not been mixed or commingled with raisins of any other varietal type. The obligation as to each varietal type shall be computed according to the reserve percentage established by the Secretary, and the percentage of the varietal type contained in the mixed lot as shown by the incoming inspection certificate applicable thereto.

(b) *Storage of reserve tonnage raisins*—(1) *Time limits for setting aside pool tonnage.* Handlers shall be allowed 3 calendar days (exclusive of Saturdays, Sundays, and holidays), after the preliminary or interim percentages have been computed and announced by the Committee, and after the publication in the FEDERAL REGISTER of the applicable final reserve percentages established for the crop year, or after any reserve tonnage raisins are acquired subsequent to the percentages being announced or established, to segregate and properly stack each varietal type of reserve tonnage raisins.

(2) *Conditions.* Each handler shall store reserve tonnage raisins in storage and under conditions which protect them from rain and which reasonably can be expected to maintain the raisins free of any biological or other infestation or contamination. Each handler shall, pursuant to § 989.66(b)(2), store each varietal type of reserve tonnage raisins held by him for the account of the Committee, separate and apart from all

other raisins. Storage of such raisins shall be deemed "separate and apart" if the containers are so marked and placed as to be capable of ready and clear identification as to the category in which are held. Reserve tonnage raisins shall be stored in sweat boxes, picking boxes, or other portable containers not exceeding one ton capacity:

(3) *Substitution of free tonnage.* A handler may, pursuant to § 989.66(b)(3), after giving the Committee reasonable advance notice in writing and under its direction and supervision, substitute standard raisins for reserve tonnage raisins.

(c) *Remedy in the event of failure to deliver reserve tonnage raisins.* A handler who fails to deliver to the Committee, upon request, any reserve tonnage raisins in the quantity and quality for which he has become obligated (after any shrinkage allowances which may then be in effect are applied and allowances for any deterioration due to conditions beyond his control are made) shall compensate the Committee for the amount of the loss resulting from his failure to so deliver. The amount of compensation for any shortage of tonnage shall be determined by multiplying the quantity of reserve raisins not delivered by the latest weighted average price per ton received by producers during the particular crop year for free tonnage raisins of the same varietal type or types, plus any charges already paid or credited to the handler and cost incurred by the Committee on account of the handler's failure to deliver. The weighted average price shall be determined from those sales made during the particular crop year up to the time such cash payment is re-

quested by the Committee, or up to the end of the particular crop year, whichever date may be earlier. The amount which a handler shall compensate the Committee for any reserve raisins which have deteriorated so as to be off-grade in quality during storage for reasons within his control, shall be the latest weighted average price received by the Committee for the applicable varietal type of reserve pool raisins, less the amount actually received by the Committee in the disposition of the deteriorated raisins delivered by the handler (or the salvage value of such raisins as determined by the Committee). Any amounts paid to the Committee in satisfaction of such deficiencies shall accrue to the earnings of the applicable reserve pool. The remedies provided in this paragraph shall be in addition to, and not exclusive of, any or all of the remedies or penalties prescribed in the act for failure on the part of the handler to comply with the applicable provisions of the act or of this part.

(d) *Disposition of reserve tonnage raisins which become off-grade for causes beyond the handler's control.* Any reserve tonnage raisins held by or for the account of the Committee which become off-grade for reasons beyond the handler's control shall, at the Committee's discretion, be reconditioned or disposed of by the Committee, or under the Committee's control, in eligible nonnormal outlets. Any monetary loss sustained in the reconditioning or disposition of such raisins, not covered by insurance carried by the Committee, shall be charged to the applicable reserve pool.

(e) *Offers of reserve tonnage raisins to handlers for sale in export.* Whenever the Committee offers re-

serve tonnage raisins to handlers for sale in export, it shall specify in addition to the normal contract terms and conditions, the total quantity, the price and period within which each handler will be permitted to purchase his share of the offer. Whenever a handler's share of an offer is less than, or exceeds, his holding of reserve tonnage raisins by not more than 10 tons, the Committee may adjust his share so as to avoid the cost involved in the physical transfer of raisins. If, prior to the expiration of the offer period, a handler desires to obtain reserve tonnage in an amount greater than that represented by his share of the offer, he may negotiate with another handler for any unpurchased portion of the other handler's share of an outstanding offer. No such transaction shall be deemed to reduce the transferring handler's share or to increase the transferee handler's share so as to affect either handler's share privileges in subsequent offers. Transfers to implement such transactions between handlers shall be permitted by the Committee only upon receipt of written authorization, on a form furnished by the Committee, by the transferring handler. All limitations applicable to the transferred tonnage shall continue to apply. Such reserve tonnage raisins will be released by the Committee to the transferee handler upon submission of his completed application and full payment for such raisins, and such transferee handler shall be responsible to the Committee for all documentation required in connection with the transaction. All such transfers shall be made at the expense of the handlers concerned.

REPLY BRIEF

Supreme Court, U.S.
FILED
MAR 13 2013
OFFICE OF THE CLERK

No. 12-123

In the Supreme Court of the United States

MARVIN D. HORNE, ET AL.,

Petitioners,

v.

UNITED STATES DEPARTMENT OF AGRICULTURE,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR PETITIONERS

BRIAN C. LEIGHTON
Attorney at Law
701 Pollasky Avenue
Clovis, CA 93612
(559) 297-6190

MICHAEL W. MCCONNELL*
ADITYA BAMZAI
JOSEPH CASCIO
AARON L. NIELSON
Kirkland & Ellis LLP
655 Fifteenth Street, NW
Washington, DC 20005
(202) 879-5000
michael.mcconnell@kirkland.com
**Counsel of Record*

Counsel for Petitioners

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

TABLE OF CONTENTS

Pag

TABLE OF AUTHORITIES .....

REPLY BRIEF FOR PETITIONERS.....

I. The government's jurisdictional ripeness arguments fail. .....

A. The government acknowledges that supplementing the AMAA with Tucker Act remedies would not be "consistent with the policies of the AMAA." .....

B. The *Apfel* plurality's rule should be adopted and controls the outcome here. ...

C. Petitioners may raise the Takings Clause as a defense.....

II. The AMAA withdraws Tucker Act jurisdiction for "handlers" of raisins. .....

III. The government's new merits arguments fail. .....

CONCLUSION .....

TABLE OF AUTHORITIES

Page(s)

Cases

Bell Atl. Tel. Cos. v. *FCC*,
24 F.3d 1441 (D.C. Cir. 1994) 16

Bonaparte v. *Camden & A.R. Co.*,
3 F. Cas. 821 (C.C.N.J. 1830) 13

Cherokee Nation v. *S. Kansas Ry.*,
135 U.S. 641 (1890) 4, 14

Eastern Enterprises v. *Apfel*,
524 U.S. 498 (1998) 2, 6, 10, 11, 12

eBay Inc. v. *MercExchange, LLC*,
547 U.S. 388 (2006) 14

FCC v. *Florida Power Corp.*,
480 U.S. 245 (1987) 15, 16

Kaiser Aetna v. *United States*,
444 U.S. 164 (1979) 8, 15

Larson v. *Domestic & Foreign Commerce Corp.*,
337 U.S. 682 (1949) 16, 17

Missouri Pacific Railway v. *Nebraska*,
217 U.S. 196 (1910) 20, 21

Monsanto Co. v. *Geertson Seed Farms*,
130 S. Ct. 2743 (2010) 14

Northpoint Tech., Ltd. v. *FCC*,
414 F.3d 61 (D.C. Cir. 2005) 16

Reg'l Rail Reorganization Act Cases,
419 U.S. 102 (1974) 4, 9

Ruckelshaus v. *Monsanto Co.*,
467 U.S. 986 (1984) 4

San Remo Hotel, L.P. v. *City & Cnty. of S.F.*,
545 U.S. 323 (2005) 14

SEC v. *Chenery Corp.*,
318 U.S. 80 (1943) 2, 19

Sosa v. *Alvarez-Machain*,
542 U.S. 692 (2004) 19

Steel Co. v. *Citizens for a Better Env't*,
523 U.S. 83 (1998) 2

Stop the Beach Renourishment, Inc. v. *Fla. Dep't of Envtl. Prot.*,
130 S. Ct. 2592 (2010) 5

Suitum v. *Tahoe Reg'l Planning Agency*,
520 U.S. 725 (1997) 5

Union Bridge Co. v. *United States*,
204 U.S. 364 (1907) 15

United States v. *Am. Friends Serv. Comm.*,
419 U.S. 7 (1974) 14

United States v. *Mitchell*,
463 U.S. 206 (1983) 13

United States v. *Mottaz*,
476 U.S. 834 (1986) 13

United States v. *Riverside Bayview Homes, Inc.*,
474 U.S. 121 (1985) 16

United States v. *Ruzicka*,
329 U.S. 287 (1946) 10, 17

United States v. *Testan*,
424 U.S. 392 (1976) 13

Village of Norwood v. *Baker*,
172 U.S. 269 (1898) 21, 22

Wilkie v. *Robbins*,
551 U.S. 537 (2007) 21

Williamson Cnty. Reg'l Planning Comm'n v.
Hamilton Bank,
473 U.S. 172 (1985) 4, 14, 16

Youngstown Sheet & Tube Co. v. *Sawyer*,
343 U.S. 579 (1952) 8

Statutes, Rules, and Regulations

7 U.S.C. § 608c(1) 6

7 U.S.C. § 608c(5) 18

7 U.S.C. § 608c(6)(E) 6

7 U.S.C. § 608c(13)(B) 18

7 U.S.C. § 608c(14)(A) 18

7 U.S.C. § 608c(15)(A) 17, 18

28 U.S.C. § 1491(a)(1) 13

47 U.S.C. § 402(a) 16

47 U.S.C. § 402(b) 16

7 C.F.R. § 989.15 6

7 C.F.R. § 989.53(a) 6

7 C.F.R. § 989.66(h) 6

7 C.F.R. § 989.79 6

7 C.F.R. § 989.80 6

7 C.F.R. § 989.166(c) 22

Fed. R. Civ. P. 71.1(h) 15

Other Authorities

76 Fed. Reg. 18,003 (Apr. 1, 2011) 6

REPLY BRIEF FOR PETITIONERS

The issue before this Court is whether the panel was correct that it "lack[ed] jurisdiction to address the merits of the Hornes' takings claim" because that claim was "premature." JA306. After litigating this case on the merits through two rounds at the Department of Agriculture (USDA), the district court, and the Ninth Circuit, the government argued for the first time in its opposition to petitioners' rehearing petition that petitioners' "takings claim is premature until [they] have exhausted their rights" under the Tucker Act, asserting that, because this issue related to "subject matter jurisdiction," the government could raise it "at any point in the litigation." JA241-242. Accepting this argument, the panel withdrew its prior merits opinion and instead held that petitioners were required to pursue their takings claim in the Court of Federal Claims.

Petitioners contend that characterizing the Tucker Act's exhaustion requirement as jurisdictional confuses constitutional ripeness with the traditional equitable principles governing choice of remedies, under which plaintiffs are not entitled to an injunction against government action where they have an adequate remedy at law. For much the same reason the Court has recently distinguished subject-matter jurisdiction from claims-processing rules and from substantive elements of a claim, the Court should distinguish between subject-matter jurisdiction and choice-of-remedy principles. See Pet. Br. 40-42.

Far from disputing petitioners' argument, the government retreats from the position it successfully

pressed on the court below. The government now professes uncertainty about whether the issue should "be considered a matter of 'ripeness' that concerns the court's 'jurisdiction' in the Article III sense of that term" or "a substantive ingredient" of an injunctive takings claim. Resp. Br. 46-48; contrast JA241-242. The government now contends that "[w]hether conceived of as a question of jurisdiction * * * or as a question going to the merits, the outcome in this case *is the same*," Resp. Br. 47 (emphasis added), relying on a host of arguments — many never before raised in this litigation — for why petitioners' claim "would fail" *on the merits*, Resp. Br. 31.

This entire approach is misguided. An Article III court must first establish its jurisdiction. *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83 (1998). If (as petitioners have explained and the government nowhere disputes) the ripeness doctrine for takings is properly viewed as a substantive principle of choice of remedies, then the courts below had jurisdiction and the panel must be reversed. On remand, the government will have the opportunity to present its merits arguments subject to ordinary rules of forfeiture. That opportunity may in practice be limited, since the USDA's *sole* justification in agency proceedings was that it could take farmers' raisins *without just compensation*. JA39, JA73, JA111; see *SEC* v. *Chenery Corp.*, 318 U.S. 80 (1943).

The courts below were the right forum for petitioners to obtain reversal of the order to pay monetary compensation for raisins the government wrongfully asserts it is entitled to take without just compensation. Petitioners *can satisfy* the traditional standard for obtaining injunctive relief under *Eastern Enterprises* v. *Apfel*, 524 U.S. 498, 521 (1998), but

they *need not* satisfy that standard because they raise their takings claim as a defense. In addition, the Agricultural Marketing Agreement Act (AMAA) withdraws Tucker Act jurisdiction for "handlers" of raisins, a "capacity" in which petitioners must surely bring their defense to a fine that was imposed on them as "handlers."

The government, moreover, now acknowledges "that there is a category of cases in which a takings claim may be cognizable in a suit for equitable relief in district court, notwithstanding the Tucker Act, because the particular statutory provision involved is not properly understood to contemplate the payment of compensation by the United States if it were found to result in a taking." Resp. Br. 50. But after conceding that, based on its "language, context, and history," the AMAA may well "fall[] into that category," the government cites two reasons — both patently meritless — for requiring petitioners to raise their takings claim in the Court of Federal Claims. *Ibid.*

This Court should not allow the government to turn takings challenges into a regulatory-jurisdictional labyrinth. The Hornes grow raisins. The government believes it is entitled to appropriate a large portion of their crop, or its monetary equivalent, without compensation. Both the Constitution and the statute entitle the Hornes to assert their constitutional rights, without making costly and duplicative trips to different courts.

I. The government's jurisdictional ripeness arguments fail.

As petitioners have explained, the decision below was predicated on language in recent decisions mistakenly equating the standard for obtaining injunc-

tive relief with the subject-matter-jurisdiction standard for ripeness. See Pet. Br. 38-42; *Williamson Cnty. Reg'l Planning Comm'n* v. *Hamilton Bank*, 473 U.S. 172, 194 (1985) (citing *Cherokee Nation* v. *S. Kansas Ry.*, 135 U.S. 641, 659 (1890)). Any "ripeness" limitation on takings claims is better understood as an application of the traditional doctrine from the law of remedies limiting the availability of affirmative injunctive relief where the claimant has access to an adequate remedy at law. Pet. Br. 27-42. Contrary to the government's assertion below, the panel had Article III jurisdiction.

The government nowhere disputes this analysis. Instead, it merely states that *Williamson County*'s ripeness twist to the injunctive-relief standard "is *consistent with* the proposition that where a remedy at law is available — namely, monetary compensation under the Tucker Act — injunctive relief to prevent an alleged taking is unavailable." Resp. Br. 24 n.12 (emphasis added). But that is no response. The rule is jurisdictional or it is not. Petitioners showed that the *Williamson County* rule bears no resemblance to ordinary ripeness principles and that cases before and after *Williamson County* treated the question of ripeness in Takings Clause claims as distinct from whether there was an adequate remedy at law precluding entry of an injunctive remedy. Pet. Br. 38-42; see *Reg'l Rail Reorganization Act Cases*, 419 U.S. 102 (1974) (holding that the takings claim was ripe but that injunctive relief was unavailable); *Ruckelshaus* v. *Monsanto Co.*, 467 U.S. 986 (1984) (reaching the merits of the takings claim and then holding that injunctive relief was not available); *Cherokee Nation*, 135 U.S. at 659 (treating the question of adequate remedy at law as one arising from

equitable choice-of-remedies doctrine not jurisdiction); see also *Stop the Beach Renourishment, Inc.* v. *Fla. Dep't of Envtl. Prot.*, 130 S. Ct. 2592, 2610 (2010) (treating takings clause ripeness as non-jurisdictional); *Suitum* v. *Tahoe Reg'l Planning Agency*, 520 U.S. 725, 733 n.7 (1997) (similar). The government's silence in response can be read as concession.

A. The government acknowledges that supplementing the AMAA with Tucker Act remedies would not be "consistent with the policies of the AMAA."

The government concedes that certain "features" of the AMAA indicate that "Congress would not have intended to pay funds from the federal Treasury to maintain the particular program here if it were found to result in a taking, and thus would instead have preferred it to be enjoined." Resp. Br. 50. But the government insists that petitioners' takings defense must be dismissed because the "broader structure" of the AMAA "suggests that Congress would not have preferred an injunction in district court to an action for compensation under the Tucker Act." Resp. Br. 51. The two aspects of the AMAA's purported "broader structure" that the government identifies, however, are irrelevant.

1. According to the government, "petitioners are correct" that "a takings claim may be cognizable in a suit for equitable relief in district court, notwithstanding the Tucker Act, because the particular statutory provision involved is not properly understood to contemplate the payment of compensation by the United States if it were found to result in a taking." Resp. Br. 50; see *Apfel*, 524 U.S. at 521 (explaining

that equitable relief is proper where "Congress could not have contemplated that the Treasury would compensate" for a takings claim); Resp. Br. 42-43 (citing cases where the statute did not provide for compensation, and the Court allowed a takings defense). The government points to "several features" of the AMAA's "language, context, and history" that "indicate that it falls in this category." Resp Br. 51.

Several factors make that clear. Marketing orders under the AMAA "are designed to regulate private parties" alone without "any direct expenditure of government funds." *Id.*; see also 7 U.S.C. §§ 608c(1), 608c(6)(E); 7 C.F.R. §§ 989.15, 989.53(a), 989.66(h), 989.79, 989.80 (collectively providing that Raisin Administrative Committee ("RAC") operations shall be funded from proceeds of sale of reserved raisins and surplus shall be returned to producers on pro rata basis, with remainder of funding to come from assessments on handlers); 76 Fed. Reg. 18,003, 18,004 (Apr. 1, 2011) (describing funding of RAC operations). As in *Apfel*, the AMAA "orders the affairs of private market actors without any direct burden on the public fisc." Resp. Br. 51.

Moreover, the marketing order specifies the amount of compensation Congress is willing to pay, which is the price of the raisins in non-competitive markets minus the RAC's administrative costs. Resp. Br. 6; 7 U.S.C. § 608c(6)(E); 7 C.F.R. §§ 989.53(a), 989.66(h), 989.67. That indicates the lack of any intention to pay *more*. Having allowed the RAC to set prices for reserve raisins and to fund its operations out of the raisin reserve, Congress would not have wanted to layer an additional Tucker Act remedy on top of the complex scheme of payments and transfers. It would "instead have preferred it to be enjoined ra-

ther than give rise to the payment of compensation under the Tucker Act." Resp. Br. 51. As the government acknowledges, requiring the USDA to pay farmers the market value of confiscated raisins would not be "consistent with the policies of the AMAA." Resp. Br. 53.

2. In the face of these clear indications of congressional intent, the government nevertheless contends that the AMAA envisions a supplementary Tucker Act remedy — albeit only "in the narrow circumstances presented here," Resp. Br. 50, leaving open the possibility that in some future "circumstances" a Tucker Act remedy would not be available. The government, however, identifies only two supposed countervailing "features" that supposedly indicate Congress would have wanted to supplement the AMAA's remedial scheme with Tucker Act claims. Both are meritless.

First, according to the government, Congress "designed the AMAA to increase prices * * * and thus assumed the scheme would *benefit* producers." Resp. Br. 51; *id.* at 52 ("[E]ven if Congress thought there was a risk that a reserve requirement would constitute a taking of a producer's commodities, Congress might well have expected the just compensation for any such taking to be zero because the marketing order would result in net benefits for producers."). Putting aside that it is doubtful that the government's decision to take and to use raisins somehow benefits petitioners, these assertions merely restate the common premise that Congress did not foresee, and would not have intended, payment of compensation, because it believed erroneously that the raisin program would not be held to be a taking. That tells us nothing about what Congress would have intended "if

it were found to result in a taking." Resp. Br. 50.

Second, the government notes that "the AMAA vests the Executive Branch with significant administrative authority to modify or abandon commodity regulation under the statute as necessary," which would allow the USDA to terminate the "current marketing order on the ground that it was no longer consistent with the policies of the AMAA" if a claimant obtained a compensation award from the United States "arising out of the reserve requirement." Resp. Br. 52-53. That argument, in effect, ascribes to Congress an intention to allow one claimant to succeed on his takings claim, but not others once the USDA repealed the Raisin Marketing Order.

But the government nowhere cites any case for the novel proposition that Congress would want to establish such a "one-bite" regime. It makes no sense to have the question of which court should hear a takings claim depend on a factor as difficult to ascertain as whether the Executive Branch would abandon its enforcement of the law in response to a just compensation award. That is no doubt why cases addressing takings claims on the merits have given no weight to the fact that the Executive Branch had the authority to stop the taking. See, *e.g.*, *Kaiser Aetna* v. *United States*, 444 U.S. 164, 168-169 (1979) (government-initiated enforcement action for public access to property); *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 585 (1952) (property seizure based on unilateral executive order). In these cases, federal courts simply reached the merits of the takings claim upon concluding that the underlying regime made no provision for just compensation, rather than requiring a party to proceed to the claims court to determine whether compensation was available there.

None of the cases suggested that executive discretion made resolution of the takings claim improper. See *Reg'l Rail*, 419 U.S. at 150 n.36 ("To delay until any Court of Claims adjudication with respect to the form of consideration provided by the Act would be exceedingly irresponsible: while the fact that Congress did not contemplate a taking does not pretermit a Tucker Act remedy, it does suggest that Congress might wish to consider whether to abandon the whole Act if it turned out that the entire value of the rail properties must be paid in cash."); compare Resp. Br. 23 n.11 (quoting this passage of *Regional Rail* as holding that "'the fact that Congress did not contemplate a taking does not pretermit a Tucker Act remedy'") (alteration omitted).

3. The government suggests that "if the courts in the Tucker Act proceeding were to conclude that compensation is not available even if the particular federal action did constitute a taking," a "suit [would] then lie in district court." Resp. Br. 24. That cannot be right. It is undisputed that petitioners are entitled to proceed in district court unless they have a "reasonable, certain, and adequate remedy at law," under the Tucker Act. Resp. Br. 21-22. If the claims court cannot provide a remedy (because petitioners must return to district court), then the Tucker Act is not an adequate remedy.

Indeed, it makes sense for the district court — not the claims court — to decide whether the statute "falls into this category." That pure question of statutory interpretation may well require familiarity with the intricacies of the statutory scheme that Congress adopted. As petitioners have already explained, Congress insisted that *all* challenges to marketing orders be brought before the agency, with district

court review based on the administrative record. See *United States* v. *Ruzicka*, 329 U.S. 287, 294 (1946). A separate suit in the claims court would, contrary to Congress's intentions, be based on an independent record, with fact-finding and legal judgments made *de novo*. Where Congress did not intend compensation, it defeats the purposes of all parties to be in a court whose only remedial power is to grant compensation.

B. The *Apfel* plurality's rule should be adopted and controls the outcome here.

The government concedes that "[p]etitioners are correct" that, under *Apfel*, parties may "obtain injunctive relief against an alleged taking based on a 'direct transfer of funds mandated by the Government.'" Resp. Br. 29 (quoting 524 U.S. at 521). And the government does not dispute that the full Court should adopt the *Apfel* plurality's rule regarding the availability of injunctive relief under the Takings Clause. See Resp. Br. 50 (affirmatively relying on *Apfel*).

It argues instead that *Apfel* does not apply because the fine might not be the "dollar-for-dollar equivalent of the just compensation that would have been awarded if, hypothetically, [petitioners] had *complied* with the reserve requirement." Resp. Br. 33. That "dollar-for-dollar equivalence," however, is not required by *Apfel*, and it would make no sense to base a jurisdictional rule on it.

The logic of *Apfel* does not depend on precise dollar-for-dollar equivalence. While the government is seeking to extract a cash payment from the private party, that party has no action for "damages" in the claims court, which is the only basis for jurisdiction under the Tucker Act. To require it to pay cash in

one court only to make a subsequent trip to the Court of Federal Claims to get it back is an "utterly pointless set of activities." 524 U.S. at 521.

Whether the amount paid in one court is precisely the same as that returned in the other is a question for the merits, which cannot be determined at the jurisdictional stage. Consider the government's arguments here. First, the government argues that petitioners are not entitled to sue for the entirety of the fine that was imposed against them because part of that fine pertains to raisins owned by the other members of petitioner Raisin Valley Marketing Association. Resp. Br. 34. This argument misconceives the nature of the transaction. As the USDA decision notes, the individual farmers retained ownership of their own raisins and received payment for them in the market. JA59-60. The Hornes are being required to pay the monetary equivalent of the raisins because the government's regulatory scheme makes them, as "handlers," responsible for the raisins. Having been ordered to pay the government for the raisins, the Hornes are the ones entitled to get their money back (or not to pay in the first place).

Similarly, the government claims "it is entirely likely that when all benefits and alleged losses from the reserve requirement were calculated, petitioners would have a net *gain* rather than a net loss," because "a central point of the marketing order is to benefit producers by limiting supply and thus raising prices for their commodities." Resp. Br. 37. This argument is also meritless. Even on the dubious assumption that petitioners benefit from the government's purported limiting of the size of the free-tonnage raisin market, there is no conceivable way that petitioners benefit from the government's taking

and subsequent *use* of their raisins for government purposes.

Likewise irrelevant is the government's claim that "calculating the value of the raisins is not a straightforward exercise." Resp. Br. 37. The method used for calculating value does not matter. Petitioners challenge the government's right to make farmers pay the monetary equivalent of the reserve pool raisins, whatever method the government may choose to set that value. The precise calculation by the USDA is undisputed. The relevant measure is the amount of the fine.

The ultimate point is that all these are issues for the merits that have yet to be resolved. Whether petitioners must seek relief in one court or another cannot be made to depend on disputed questions on the merits. The government never argued until its briefs before this Court that these factors had any relevance to the jurisdiction of the courts below — a failure that surely demonstrates their unsuitability to determining which court should hear petitioners' claim. Rather than collapsing the merits and jurisdictional questions, this Court should apply the straightforward rule in *Apfel* — that injunctive takings challenges to "direct transfers of funds mandated by the government" are ripe at the time the government seeks to compel the transfer.

C. Petitioners may raise the Takings Clause as a defense.

As petitioners explained in their opening brief, the doctrine that petitioners must show that they lack an "adequate remedy at law" has no application where, as here, petitioners do not seek affirmative injunctive relief, but rather seek to defeat claims the govern-

ment has initiated against them. Pet. Br. 43-47. The government's responses fall flat.

1. The government argues that the Tucker Act operates to *avoid* any constitutional violation because the Takings Clause "is not violated at all unless just compensation for any taking that may occur is unavailable through established procedures." Resp. Br. 40-41. But that confuses constitutional rights with remedies. The Tucker Act does not provide a cause of action for compensation for a taking. It waives sovereign immunity for "damages" actions "founded either upon the Constitution, or any Act of Congress * * * ." 28 U.S.C. § 1491(a)(1). It makes no sense to say that the constitutional violation does not occur until after the party seeks and is denied compensation in the claims court, because the claimant cannot sue under the Tucker Act except for a constitutional violation, which must have occurred before he can sue. See, *e.g.* *United States* v. *Mottaz*, 476 U.S. 834, 850 (1986) ("A Tucker Act-based lands suit would seek *damages* equal to just compensation for an *already completed* taking of the claimant's land."); *United States* v. *Mitchell*, 463 U.S. 206, 216 (1983) (to fall within Tucker Act, "[t]he claim must be one for money *damages* against the United States"); *United States* v. *Testan*, 424 U.S. 392, 398 (1976) (Tucker Act jurisdiction "limited to actual, presently due money *damages* from the United States") (emphases added).

As an original matter, a taking of property triggers a right to just compensation at the time of the taking. See *Bonaparte* v. *Camden & A.R. Co.*, 3 F. Cas. 821, 831 (C.C.N.J. 1830) ("duty of legislature is to provide for compensation * * * simultaneously with * * * appropriation of [ ] property"). In light of pragmatic considerations, however, this Court long ago

held that the government may take property with compensation to follow, so long as the procedures for obtaining compensation are reasonable, certain, and adequate. *Cherokee Nation*, 135 U.S. at 659. This rule did not, however, change the nature of the claim, which still *ripens* at the time of the taking. It changed only the nature and availability of the remedy. That is still the way this Court treats the issue today. For example, in *San Remo Hotel, L.P.* v. *City & County of San Francisco*, 545 U.S. 323 (2005), the Court held that a property holder may pursue a state-court section 1983 claim that denial of just compensation would violate the Fifth Amendment simultaneously with a state-law action seeking compensation. *Id.* at 346. In rejecting the argument that this simultaneity violates the *Williamson County* ripeness principle, the Court necessarily rejected the government's claim here that there can be no Takings Clause violation until after compensation has been sought and denied.

2. The government argues that "a takings 'defense' is no different in substance from an action by a property owner seeking an injunction to restrain the government from carrying out acts that allegedly would effectuate a taking of property." Resp. Br. 41. That is incorrect. Historically, parties seeking affirmative injunctive relief, unlike defendants, had to show that they lacked an adequate remedy at law. See *United States* v. *Am. Friends Serv. Comm.*, 419 U.S. 7, 11 (1974) ("[I]nadequacy of available remedies goes only to the existence of irreparable injury * * * ."); see also *eBay Inc.* v. *MercExchange, LLC*, 547 U.S. 388, 391 (2006); *Monsanto Co.* v. *Geertson Seed Farms*, 130 S. Ct. 2743, 2756 (2010). Such a showing was not necessary when a party raised a defense.

The difference is practical as well as historical. When the government goes to court to obtain title to property, the action is in the nature of eminent domain. In eminent-domain proceedings, the tribunal generally determines the right of the government to the property and the amount of compensation due to the citizen in the same proceeding. See, *e.g.*, Fed. R. Civ. P. 71.1(h). That should be true whether the government seizes farmland or raisins. Things are different when the government engages in activities that incidentally effect a taking. In those cases, an injunction would delay progress on what may be a necessary project. Accordingly, the plaintiff cannot obtain an injunction unless he satisfies traditional equitable criteria, including the lack of an adequate remedy at law.

3. The government's purported distinction of cases in which this Court has addressed takings defenses on the merits (without hinting that the property owners should first go to the claims court) is little more than a truism: It points out that in these cases, the underlying statute "makes no provision" for compensation. Resp. Br. 43. But several of these cases postdate the Tucker Act. See *FCC* v. *Florida Power Corp.*, 480 U.S. 245 (1987); *Kaiser Aetna*, 444 U.S. at 183 (adjudicating claim on the merits, without suggesting that defendant was required to forfeit property and seek compensation in the Court of Federal Claims); *Union Bridge Co.* v. *United States*, 204 U.S. 364, 365 (1907) (alleged unconstitutional taking enforced by criminal prosecution). The government does not explain why the Tucker Act did not constitute a provision for monetary compensation, or why this distinguishes the present case, where the AMAA likewise makes no provision for compensation. The

government purports to distinguish *Florida Power* on the ground that Congress "provided for exclusive review" of FCC orders under 47 U.S.C. § 402 "in the courts of appeals, thus displacing jurisdiction under the Tucker Act." Resp. Br. 26 n.13 (relying on two Federal Circuit cases addressing displacement under 47 U.S.C. § 402(b)) (citations omitted). *Florida Power*, however, was appealed using the general appeal provision of 47 U.S.C. § 402(a), which does not displace the Tucker Act. See *Northpoint Tech., Ltd.* v. *FCC*, 414 F.3d 61, 76 (D.C. Cir. 2005); *Bell Atl. Tel. Cos.* v. *FCC*, 24 F.3d 1441, 1445 n.2 (D.C. Cir. 1994).

Notably, in response to petitioners' cases, the government fails to cite a *single* case holding that a party may not raise the Takings Clause as a defense to government-initiated action. Instead, the government relies largely on *dicta* from *Williamson County*, an inverse condemnation case that did not address whether and how the Takings Clause could be invoked as a defense; and on a footnote *dictum* from *United States* v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121, 129 n.6 (1985), that petitioners have already explained is contrary to authority. Resp. Br. 39-42. To top it off, the government cites another *dictum* (from a footnote) in *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949), observing that "[w]here the action against which *specific relief* is sought is a taking, * * * the availability of a suit for compensation against the sovereign will defeat a contention that the action is unconstitutional." *Id.* at 698-699 n.18 (emphasis added). But the term "specific relief" is a synonym for "equitable" relief, meaning an injunction. See *id.* at 704 ("specific relief" would allow "court to exercise its compulsive powers to restrain the Government from acting, or to compel it to

act"). *Larson* thus supports petitioners' argument that this Court viewed the doctrine as a limitation on the availability of injunctive "specific relief" — not jurisdictional ripeness.

II. The AMAA withdraws Tucker Act jurisdiction for "handlers" of raisins.

1. The government agrees that "the AMAA withdraws Tucker Act jurisdiction" because it has its "own exclusive provisions for administrative and judicial review of a legal challenge to a marketing order * * * by '[a]ny handler subject to' that order." Resp. Br. 25 (quoting 7 U.S.C. § 608c(15)(A)). The government also agrees that the civil penalties at issue here were — and could only have been — imposed on petitioners in their "capacity as handlers." *Id.* After all, as the government admits, if petitioners were not "handlers," they could not be fined at all. Resp. Br. 3-4. And the government recognizes "petitioners' defense effectively asks the courts to prevent the USDA from imposing on petitioners any civil penalty or monetary assessment for violating the raisin marketing order's reserve requirement, on the ground that the reserve requirement amounts to an unconstitutional taking." Resp. Br. 41.

That is sufficient to show that petitioners raise their takings defense "in their capacity as handlers." Under any plausible interpretation of the AMAA, petitioners must raise their defense to a fine imposed on them as handlers in their "capacity as handlers," not some other capacity. See *Ruzicka*, 329 U.S. at 294 (holding under the AMAA that claims "formulated in constitutional terms" must be pursued through the administrative process). The government's argument that petitioners challenge only the underlying admin-

istrative scheme, rather than the fine imposed on them as "handlers," simply misunderstands the nature of petitioners' takings claim on the merits. Compare Resp. Br. 27 with *infra*, pp. 20-22.

2. At any rate, the government's asserted distinction between "claims brought by *handlers* as handlers" and those brought by handlers "in their capacity *as producers*," Resp. Br. 25, 27, lacks basis in the AMAA's text, which allows "*any* handler" seeking to challenge a civil penalty to do so through the AMAA's administrative process, subject to judicial review in district court. 7 U.S.C. §§ 608c(14)(A), 608c(15)(A). Nothing in the statute asks whether the "handler" also produces raisins, nor what type of argument the handler will raise.

The government's sole textual response relies on a provision in the AMAA providing that "no marketing order 'shall be applicable to any producer in his capacity as a producer.'" Resp. Br. 28 (quoting 7 U.S.C. § 608c(13)(B)). But that provision simply means, as a substantive limit on agency power, that producers cannot be regulated by the USDA. It says nothing about the scope of agency proceedings. Where producers also "handle" raisins, they are subject to regulation and must use administrative processes.

Indeed, as the government admits, where Congress wants to distinguish between types of handlers, it knows how to do so. See Resp. Br. 28-29 n.14. In particular, in the milk context, Congress specifically created a category of "producer-handlers." 7 U.S.C. § 608c(5). That Congress explicitly distinguished between types of handlers for specific purposes in the milk context, but not in the raisin context is powerful evidence that no comparable distinction exists for

raisins. See, *e.g.*, *Sosa* v. *Alvarez-Machain*, 542 U.S. 692, 711 n.9 (2004).

III. The government's new merits arguments fail.

The government raises several new theories regarding why petitioners' claims "would fail" on the merits. Resp. Br. 31. These merits arguments are not properly before the Court. They were neither timely presented below, nor the basis for the agency decision under challenge. *Chenery*, 318 U.S. 80. They also have no merit.

1. The government suggests that petitioners "do not have standing in any court to contend that the government has taken the raisins owned" by other producers. Resp. Br. 27; see also Resp. Br. 25. Although couched in jurisdictional terms, the government's argument bears on the merits question whether petitioners can assert a takings defense with respect to portions of the fine imposed on them for failing to transfer the raisins of other producers. This argument was neither made below, nor addressed in the agency proceedings. There is no need for this Court to address it in the first instance. The ownership of the raisins does not matter for purposes of ripeness under the Constitution or under the AMAA. At any rate, the government's argument misunderstands the economics of petitioners' business. Unlike the usual handler, who pays the producer only for free-tonnage raisins but assumes control over the entire crop, the Hornes never assumed control over their neighbors' raisins. JA125. Rather, they allowed their neighbors to use their processing equipment for a small fee. JA148-149. Their neighbors sold their own raisins and received full market price

for them. JA125-126. The Hornes, as handlers, were ordered to pay the market equivalent value for *all* the raisins processed on their equipment. JA84-86. If the fine is reversed, they (as handlers) are entitled to the benefit.

2. The government also argues that "this Court has never held that *any* requirement to pay money from unidentified sources * * * can be the basis of a takings claim," Resp. Br. 31-32; and that "the assessment of civil penalties or entry of a remedial payment order" cannot "constitute a taking of private property within the meaning of the [Takings] Clause," Resp. Br. 32.

That is incorrect. While free-standing regulatory exactions of undifferentiated money potentially might not be *per se* takings (an issue the Court need not decide in this case), it is elementary under the doctrine of constitutional remedies that a party who is fined for violating an unconstitutional order may challenge the constitutionality of the underlying order as a defense to the fine. For example, if a demonstrator violates an unconstitutional speech ordinance and is fined, no one would argue that just because he spoke, his free speech rights were not violated. A fine for disobeying a law that violates the freedom of speech is a violation of the freedom of speech.

The same is true for the Takings Clause — as this Court has already held. In *Missouri Pacific Railway* v. *Nebraska*, 217 U.S. 196 (1910), the railroad violated a state order to construct a line at its own expense to serve a particular grain elevator, and was fined $500 for its refusal. After concluding that the underlying order was a taking of property for which no compensation was forthcoming, this Court reversed

imposition of the fine. *Id.* at 208. What matters is not whether the railroad would pay the fine from "unidentified sources," but whether it was imposed to enforce an unconstitutional order. There, the Court held that it was so imposed, and thus invalidated the fine. By any measure, a party has "the right to refuse to submit to a taking where no compensation is in the offing." *Wilkie* v. *Robbins*, 551 U.S. 537, 583 (2007) (Ginsburg, J., dissenting).

Petitioners cited *Missouri Pacific Railway* for this proposition seven times in the opening brief (Pet. Br. 16, 21, 23, 24, 43, 46, 47) and the government's sole reference was non-responsive (Resp. Br. 43). Contrary to the government's assertion, "the assessment of civil penalties or entry of a remedial payment order," Resp. Br. 32, can indeed be challenged under the Takings Clause.

Petitioners' takings defense with respect to the "monetary equivalent" component of the fine is likewise valid under *Village of Norwood* v. *Baker*, 172 U.S. 269 (1898). There, a city took a strip of land to widen a public street, arguing that it need not pay compensation because the landowner would benefit from the street. After the city lost on that argument — which is similar to the "benefit" argument the government advances in this litigation, see Resp. Br. 36 — the city imposed a special assessment on the landowner of "an amount covering," *inter alia*, "a sum equal to that paid for the land taken for the street." *Village of Norwood*, 172 U.S. at 271. This Court did not hesitate to deem that monetary exaction a taking.

The same is true here. The government seeks to extract, in the guise of a "fine," the monetary equivalent of the raisins that it sought to expropriate. That

order is purely compensatory, and not in any respect punitive. See JA160, JA211; 7 C.F.R. § 989.166(c). This Court's opinion in *Village of Norwood* stands for the proposition that a government cannot get around the Takings Clause merely by requiring the payment of the "monetary equivalent" of an exaction and labeling that payment a "tax," "fine," or "assessment." In *Village of Norwood*, this Court saw past the mere labels and the same result should apply here.

3. Lastly, despite having raised its jurisdictional argument at the eleventh hour in the courts below (and having retreated from that argument before this Court), the government paradoxically claims that *petitioners* failed to raise their challenge to the fine in a proper and timely manner. According to the government, petitioners cannot challenge the imposition of the fine, because they "litigated this case as a challenge to the reserve requirement as a physical 'taking' of petitioners' raisins." Resp. Br. 31. That is incorrect. This entire litigation has been about a cash fine imposed on petitioners for their failure to comply with a regulation that is unconstitutional under the Takings Clause. The district court accurately summarized petitioners' position: The government could not "refuse to pay just compensation, and *then penalize, monetarily*, [petitioners] for refusing to transfer title and possession to the government." JA171 (quoting petitioners' trial memorandum) (emphasis added). The government has no basis for saying petitioners' argument is any different now.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

BRIAN C. LEIGHTON
Attorney at Law
701 Pollasky Avenue
Clovis, CA 93612
(559) 297-6190

MICHAEL W. MCCONNELL*
ADITYA BAMZAI
JOSEPH CASCIO
AARON L. NIELSON
Kirkland & Ellis LLP
655 Fifteenth Street, N.W.
Washington, DC 20005
(202) 879-5000
michael.mcconnell@kirkland.com
**Counsel of Record*

Counsel for Petitioners

March 13, 2013

AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

No. 12-123

In the Supreme Court of the United States

MARVIN D. HORNE, ET AL.,
PETITIONERS

v.

UNITED STATES DEPARTMENT OF AGRICULTURE,
RESPONDENT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE CATO INSTITUTE, NATIONAL FEDERATION OF INDEPENDENT BUSINESS, CENTER FOR CONSTITUTIONAL JURISPRUDENCE, AND REASON FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

WILLIAM P. FERRANTI
Winston & Strawn LLP
35 W. Wacker Drive
Chicago, IL 60601
(312) 558-5600

STEFFEN N. JOHNSON
Counsel of Record
JACOB R. LOSHIN
Winston & Strawn LLP
1700 K Street, N.W.
Washington, DC 20006
(202) 282-5000
sjohnson@winston.com

Counsel for Amici Curiae
[Additional Counsel Listed on Inside Cover]

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

Library of Congress
Law Library

ILYA SHAPIRO
Cato Institute
1000 Mass. Ave.
Washington, DC 20001
(202) 842-0200
ishapiro@cato.org

Counsel for Cato Institute

KAREN R. HARNED
ELIZABETH MILITO
NFIB Small Business Legal Center
1201 F St., NW, Ste. 200
Washington, DC 20004
(202) 406-4443
elizabeth.milito@nfib.org

Counsel for National Federation of Independent Business

JOHN C. EASTMAN
Center for Constitutional Jurisprudence
c/o Chapman University School of Law
One University Drive
Orange, CA 92886
(714) 628-2500
jeastman@chapman.edu

Counsel for Center for Constitutional Jurisprudence

MANUEL S. KLAUSNER
Law Offices of Manuel S. Klausner, P.C.
One Bunker Hill Bldg.
601 West Fifth Street
Los Angeles, CA 90071
(213) 617-0414
mklausner@klausnerinc.com

Counsel for Reason Foundation

QUESTION PRESENTED

Whether a party may raise the Takings Clause as a defense to enjoin a "direct transfer of funds mandated by the Government," *Eastern Enterprises* v. *Apfel*, 524 U.S. 498, 521 (1998) (plurality), or must instead pay the money and then bring a separate, later claim requesting reimbursement of the money under the Tucker Act in the Court of Federal Claims.

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF AUTHORITIES iv

INTRODUCTION AND INTEREST OF *AMICI CURIAE* 1

STATEMENT 3

SUMMARY OF ARGUMENT 6

ARGUMENT 8

I. The Ninth Circuit's ripeness rule imposes substantial burdens on property owners that are not justified by any legitimate purpose 8

A. When the government initiates proceedings to take money, it is pointless to require a property owner to bring a separate suit for compensation. 9

B. Individuals and small business owners should not have to shoulder the burden of litigating against the government twice 14

II. The Ninth Circuit's extension of *Williamson County* has no basis in the Constitution's text and structure, or in ripeness doctrine generally. 18

A. Property owners should not be required to suffer a violation of their constitutional rights before being allowed to raise those rights. 19

B. The text and history of the Takings Clause do not permit the government to defer compensation until after a taking has occurred. 23

C. There is no reason to treat the Takings and Due Process Clauses differently 25

CONCLUSION 27

APPENDIX A: LIST OF *AMICI* 1a

TABLE OF AUTHORITIES

Page(s)

CASES

Abbott Labs. v. *Gardner*,
387 U.S. 136 (1967) 13

Albertson v. *Subversive Activities Control Bd.*,
382 U.S. 70 (1965) 21

Baker v. *McCollan*,
443 U.S. 137 (1979) 25

Bay View, Inc. v. *AHTNA, Inc.*,
105 F.3d 1281 (9th Cir. 1997) 5, 19

Bennis v. *Michigan*,
516 U.S. 442 (1996) 22

Bowles v. *United States*,
31 Fed. Cl. 37 (1994) 15

Carter v. *Carter Coal Co.*,
298 U.S. 238 (1936) 20

Church of the Lukumi Babalu Aye, Inc. v. *City of Hialeah*,
508 U.S. 520 (1993) 21

Duke Power Co. v. *Carolina Envtl. Study Group, Inc.*,
438 U.S. 59 (1978) 9, 21

Eastern Enterprises v. *Apfel*,
524 U.S. 498 (1998) ..... *passim*

Estate of Hage v. *United States*,
687 F.3d 1281 (Fed. Cir. 2012) 15

Evans v. *United States*,
74 Fed. Cl. 554 (2006) 3

FCC v. *Fla. Power Corp.*,
480 U.S. 245 (1987) 22

Goldblatt v. *Town of Hempstead, N.Y.*,
369 U.S. 590 (1962) 22

Holman v. *City of Warrenton*,
242 F. Supp. 2d 791 (D. Or. 2002) 16

Hooper v. *California*,
155 U.S. 648 (1895) 13

In re Chateaugay Corp.,
53 F.3d 478 (2d Cir. 1995) 10, 19

Kaiser Aetna v. *United States*,
444 U.S. 164 (1979) 22

Lindsey v. *Normet*,
405 U.S. 56 (1972) 21

McDonald v. *City of Chicago*,
130 S. Ct. 3020 (2010) 21

Md. & Wash. Ry. Co. v. *Hiller*,
8 App. D.C. 289 (C.A.D.C. 1896) 24

Nat'l Park Hospitality Ass'n v. *Dep't of the Interior*,
538 U.S. 803 (2003) 18

Parratt v. *Taylor*,
451 U.S. 527 (1981) 25

Payne v. *Tennessee*,
501 U.S. 808 (1991) 27

Pierce v. *Soc'y of Sisters*,
268 U.S. 510 (1925) 21

Regional Rail Reorg. Act Cases,
419 U.S. 102 (1974) 10

San Remo Hotel, L.P. v. *City & Cnty. of S.F., Cal.*,
545 U.S. 323 (2005) 13, 23

Steffel v. *Thompson*,
415 U.S. 452 (1974) 21

United States v. *United Foods, Inc.*,
533 U.S. 405 (2001) 21

Wash. Legal Found. v. *Tex. Equal Access to Justice Found.*,
270 F.3d 180 (5th Cir. 2001) 19

Wilkie v. *Robbins*,
551 U.S. 537 (2007) 23

Williamson County Regional Planning Commission v. *Hamilton Bank of Johnson City*,
473 U.S. 172 (1985) ..... *passim*

Zinermon v. *Burch*,
494 U.S. 113 (1990) 25, 26

STATUTES & REGULATIONS

7 U.S.C. § 602(4) (2006) 3

7 U.S.C. § 608c (2006) 3, 4, 5, 11

7 C.F.R. § 989.21 4

7 C.F.R. § 989.26 4

7 C.F.R. § 989.29 4

7 C.F.R. § 989.30 4

7 C.F.R. § 989.35 3

7 C.F.R. § 989.36 3

7 C.F.R. § 989.54 4

7 C.F.R. § 989.65 4

7 C.F.R. § 989.66 4

14 Fed. Reg. 5136 (Aug. 18, 1949) 3

OTHER AUTHORITIES

John Adams, *Discourses on Davila* in 6 The Works of John Adams, Second President of the United States (Charles Francis Adams ed. 1851) 22

Abraham Bell & Gideon Parchomovsky, *Taking Compensation Private*, 59 Stan. L. Rev. 871 (2007) 16

Robert Brauneis, *The First Constitutional Tort: The Remedial Revolution in Nineteenth-Century State Just Compensation Law*, 52 Vand. L. Rev. 57 (1999) 24

Dan Browning, *MnDOT's Tactics Squeeze Landowners*, Minneapolis Star Tribune (Sept. 20, 2003) 15, 16

Dick M. Carpenter II & John K. Ross, Victimizing the Vulnerable (2007) 17

Sandra Chereb, *Wayne Hage, Nevada Rancher and Sagebrush Rebel, Dies*, The Associated Press (June 6, 2006) 15

David P. Currie, Federal Jurisdiction in a Nutshell (4th ed. 1999) 8

The Federalist No. 54 (James Madison) (Clinton Rossiter ed. 1961) 22

Klemm Analysis Group, Small Business Association Office of Advocacy, *Impact of Litigation on Small Business* (Oct. 2005) 14

Thomas M. Lenard & Michael P. Mazur, *Harvest of Waste: The Marketing Order Program*, Regulation, May/June 1985 3

Magna Carta, Cl. 28 (1215) 8, 25

Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 Harv. L. Rev. 1165 (1967) 17

Gouverneur Morris, The Records of the Federal Convention of 1787 (Max Farrand ed. 2d ed., 1937) 22

Phillip Nichols, The Law of Eminent Domain (1917) 24

Ilya Shapiro & Carl G. DeNigris, *Occupy Pennsylvania Avenue: How the Government's Unconstitutional Actions Harm the 99%*, 60 Drake L. Rev. 1085 (2012) 17

Jillian Swords, *Eminent Domain Leaves Businesses Homeless*, The Appalachian (Feb. 12, 2008) 16

Lynnette Taylor, *Eminent Domain Case Leaves Surry County Family Homeless*, WITN (Nov. 17, 2007) 16

U.S. Chamber Inst. for Legal Reform, *Tort Liability Costs for Small Business* (July 2010) 14

INTRODUCTION AND INTEREST OF *AMICI CURIAE*

Amici, described more fully in the Appendix, are advocates who believe that the right to keep and control one's own property is among the most fundamental rights protected by the Constitution, and that the government should not make property owners suffer needless burdens in order to vindicate those rights.

This case involves one such burden. In the government's view, property owners who have been wrongfully ordered to pay the government money—in proceedings the government itself initiated—should not at that time be permitted to invoke the Takings Clause in their defense. Instead, the government says, after litigating all other constitutional and statutory defenses, such property owners should have to hand over their money. They should then have to go to a different forum, the Court of Federal Claims, and file a separate suit against the government under the Tucker Act just to make their takings defense "ripe." Only then, in the government's view, should a court decide whether the monies the property owners had to pay were unconstitutional takings. And if they were, only then would the property owners receive their money back.

This Rube Goldberg approach to adjudicating takings claims serves no valid purpose. And for that reason, a plurality of this Court squarely rejected it

---

* The parties consented to the filing of this brief. The letters of consent are on file with the Clerk. In accordance with Rule 37.6, *amici* state that no counsel for any party authored this brief in whole or in part, and that no person or entity, other than the *amici*, has contributed monetarily to the preparation or submission of this brief.

in *Eastern Enterprises* v. *Apfel*, 524 U.S. 498 (1998). The plurality—consisting of all Justices who reached the issue—rightly recognized that having to jump through such hoops to assert a takings claim "would entail an utterly pointless set of activities." *Id.* at 521 (quotation omitted). The Court should reaffirm that ruling here.

In *Williamson County Regional Planning Commission* v. *Hamilton Bank of Johnson City*, 473 U.S. 172 (1985), this Court held that a government taking of real or tangible personal property is not ripe for challenge until a property owner has sought monetary compensation for the property that has been taken. In federal cases, that means a suit for damages in the Court of Federal Claims under the Tucker Act. *Id.* at 195. But where the government takes a party's *money* rather than its real or tangible personal property, *Williamson County*'s ripeness rule makes no sense—the government does not take money, only to give it right back in the form of "compensation." The plurality in *Apfel* thus recognized an exception to the rule of *Williamson County* for takings of money.

As we explain in Part I, that exception is eminently sensible. Requiring a property owner to file a separate claim for compensation serves no useful purpose, and it would impose substantial burdens on individual property owners—as well as small businesses like the raisin farmers here—who are already over-burdened by the cost of litigation. And in addition to making no practical sense, the government's ripeness rule also makes no constitutional sense. As we explain in Part II, neither the text of the Takings Clause nor this Court's ripeness doctrine requires that a fine be paid before it can be challenged as an uncompensated taking.

STATEMENT

1. Since the New Deal, the federal government has heavily controlled the supply of agricultural products, ostensibly to prevent "unreasonable fluctuations in supplies and prices." 7 U.S.C. § 602(4) (2006); see *Evans* v. *United States*, 74 Fed. Cl. 554, 558 (2006). Under the Agricultural Marketing Agreement Act of 1937 and its implementing regulations, the United States Department of Agriculture ("USDA") issues "marketing orders" that manipulate prices by imposing production quotas or restricting supply. 7 U.S.C. § 608c (2006).

A much-criticized relic of the New Deal, these marketing orders are effectively government-enforced cartels that fine farmers who attempt to sell more than their allotted quotas, and that "deploy the legal powers of the government to manipulate supply in an effort to increase grower profits." See generally Thomas M. Lenard & Michael P. Mazur, *Harvest of Waste: The Marketing Order Program*, Regulation, May/June 1985, at 21.[1]

2. This case involves the USDA's marketing order for raisins. 14 Fed. Reg. 5136 (Aug. 18, 1949). Under that order, "handlers" of raisins must reserve a certain portion of their crop, which they may not sell on the open market. The percentage of the crop that must be reserved each year is established by the USDA, based on the recommendations of a committee of industry representatives. 7 C.F.R. §§ 989.35, 989.36. The committee consists of 46 industry representatives and *one* representative of the public. See

---

[1]Available at: www.cato.org/pubs/regulation/regv9n3/v9n3-4.pdf.

id. §§ 989.26, 989.29, 989.30. The percentage is announced annually on February 15, long after farmers have spent substantial resources to cultivate and harvest each year's crop. *Id.* §§ 989.21, 989.54(d).

Once the set-aside percentage has been set, those "reserve-tonnage" raisins must be physically segregated from the rest of the farmers' crop and held "for the account" of the Committee, which effectively takes title. *Id.* §§ 989.65, 989.66(a), (b)(1), (b)(2), (g). The Committee may then decide to sell the raisins or simply give them away to anyone it chooses. *Id.* § 989.66(h), (b)(4).

Although other marketing orders are periodically put to a vote of producers and terminated if they do not command sufficient support, the raisin marketing order here has never been put to a revote since it was first adopted. See 7 U.S.C. § 608c(19) (2006).

During the two crop years at issue here, 2002-2003 and 2003-2004, the Committee required farmers to turn over 47 percent and 30 percent of their raisins, respectively. In 2002-2003, in return for almost half their crop, farmers received less than their cost of production. And in 2003-2004, *farmers received no compensation at all.* Pet. App. 9a.

3. Petitioners are independent farmers in Fresno and Madera Counties. During 2002-2003 and 2003-2004, after a change in their business model (see Pet. Br. 8-9), petitioners did not set aside the requisite reserve-tonnage raisins. They believed that the Raisin Marketing Order applied only to "handlers," and did not apply to them as "producers," as the statute defines those terms. Pet. App. 10a.

The government disagreed. It initiated an administrative enforcement action against petitioners, and

ultimately found them liable for failing to give up their raisins. Pet. App. 11a, 121a, 145a. The USDA ordered petitioners to pay $438,843.53, the approximate market value of the raisins that allegedly should have been relinquished. Petitioners were also ordered to hand over $202,600 in civil penalties and $8,783.39 in unpaid assessments, for a total of nearly $650,000 in fines.

4. Invoking statutory judicial review procedures, petitioners challenged the USDA's enforcement decision in the district court. See 7 U.S.C. §§ 608c(14)(A)-(B), 608c(15)(A)-(B) (2006). They raised three claims: (1) that the requirement to give up their raisin crop, and the associated fines, violate the Takings Clause of the Fifth Amendment; (2) that the penalties imposed on them violate the Excessive Fines Clause of the Eighth Amendment; and (3) that the USDA misconstrued the Raisin Marketing Order in applying it to them. The district court granted summary judgment to the USDA. Pet. App. 55a.

5. Petitioners appealed, but the Ninth Circuit affirmed, again on the merits. In response to a petition for rehearing, however, the government argued for the first time that petitioners' takings claim would not be ripe until they complete this litigation, pay the fines, and sue for damages under the Tucker Act in the Court of Federal Claims. JA242.

The panel agreed with the government, issuing a revised opinion. Invoking *Bay View, Inc.* v. *AHTNA, Inc.*, 105 F.3d 1281 (9th Cir. 1997), and this Court's decision in *Williamson County*, the panel observed that "the Tucker Act allows parties seeking compensation from the United States to bring suit in the Court of Federal Claims." Pet. App. 15a. The panel

then concluded that all takings claims—even challenges to direct transfers of money—"must be brought there in the first instance" because a takings claim is not ripe until a party has unsuccessfully sought compensation. *Ibid.* Although the panel's new opinion cited *Apfel*, it did not address *Apfel*'s conclusion that a takings defense to a direct transfer of funds is immediately ripe, without need to seek damages under the Tucker Act. JA304.

SUMMARY OF ARGUMENT

The government's overbroad reading of *Williamson County* should be rejected, and the Court should confirm what the plurality recognized in *Apfel*: When the government's demand of money from a property owner allegedly violates the Takings Clause, the takings defense is ripe immediately—without the owner's having to pay the money and file a separate suit to get it back.

Simply put, a taking in the form of a fine or other monetary payment is inherently a taking "without just compensation." Whatever might be said of takings involving real or tangible personal property, when the government seizes money, there is no reasonable possibility that "compensation" will be forthcoming. Moreover, the claimant is immediately injured from the loss of use of that money. Accordingly, there is no basis for treating a takings challenge to such seizure as unripe pending some further, future development.

Williamson County is not to the contrary. The Court there concluded that a property owner has no valid takings claim "[i]f the government has provided an adequate process for obtaining compensation, and if resort to that process yields just compensation."

473 U.S. at 194 (quotation omitted). But in contrast to a seizure of real property—where an inverse condemnation process or Tucker Act suit may yield just compensation—there is no reasonable possibility that the government will provide compensation for a fine or other monetary sanction that the government itself has demanded. To be sure, the government can be compelled to return a fine if the court in a Tucker Act suit ultimately deems the fine unconstitutional. But that conclusion does not *ripen* a constitutional issue; it *resolves* one—the exact same one that arises in a suit for declaratory or injunctive relief, or (as here) when the Takings Clause is raised as a defense by property owners in government-initiated enforcement proceedings.

The contrary rule adopted by the court below has nothing to commend it. *First*, particularly in the context of monetary seizures and defenses against direct government sanctions, the *Williamson County* rule is needlessly burdensome. There is simply no good reason to inflict on property owners the time, expense, and uncertainty of trying to recover compensation after-the-fact, in a second round of litigation in a second forum.

Second, the *Williamson County* rule is inconsistent with established principles of ripeness, the text and history of the Takings Clause, and this Court's treatment of similar deprivations under the Due Process Clause. The Court should take this opportunity to reconsider *Williamson County* and return to a much more defensible rule—dating back to Magna Carta—that government takings of private property must be accompanied by "immediate payment." Magna Carta, Cl. 28 (1215). At a minimum, the *Williamson County* rule should not be extended

from takings of real property to takings of money, much less to the situation presented here—a takings claim raised as a defense to a monetary demand made in government-initiated proceedings.

"The problem of ripeness is essentially one of prematurity." David P. Currie, Federal Jurisdiction in a Nutshell 31 (4th ed. 1999). But there is nothing premature about petitioners' claim that the government's demand for hundreds of thousands of dollars violated the Takings Clause. The decision below should be reversed.

ARGUMENT

I. The Ninth Circuit's ripeness rule imposes substantial burdens on property owners that are not justified by any legitimate purpose.

When the government "provides an adequate procedure for seeking just compensation" for the taking of *real property*, this Court reasoned in *Williamson County*, "the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure." 473 U.S. at 195. For this reason, real-property "taking claims against the Federal Government are premature until the property owner has availed itself of the process provided by the Tucker Act," which authorizes suing the United States for damages in the Court of Federal Claims. *Ibid.*

Here, however, the Ninth Circuit took that rule to an indefensible extreme, applying it to takings of *money* as well as takings of real or tangible property. In the Ninth Circuit's view, the Tucker Act effectively divests federal district courts of *all* jurisdiction over any takings claims against the United States, however raised, and even if asserted as a *defense* in an enforcement action initiated by the government itself.

Neither law nor common sense supports that rule. Although the Tucker Act provides an exclusive remedy for damages claims against the government, it places no statutory limit on the right of individuals to seek declaratory or injunctive relief from unconstitutional government action in district court. *Duke Power Co.* v. *Carolina Envtl. Study Group, Inc.*, 438 U.S. 59, 71 n.15 (1978). Nor does it deprive individuals whom the government seeks to fine (such as petitioners) from arguing in their *own defense* that the fine is unconstitutional.

As the plurality recognized in *Apfel*, those ordinary remedies should be fully available where a taking, "rather than burdening real or physical property, requires a direct transfer of funds" to the government. 524 U.S. at 521 (quotation omitted). The burdensome two-lawsuit alternative, championed by the government and accepted by the court below, serves no useful purpose.

A. When the government initiates proceedings to take money, it is pointless to require a property owner to bring a separate suit for compensation.

The most obvious reason not to extend *Williamson County*'s ripeness rule to takings of money is that doing so would be pointless.

When the government takes an individual's real or tangible personal property, the Fifth Amendment requires "just compensation"—*i.e.*, an exchange of tangible property for money. In that context, a suit for damages under the Tucker Act serves as a mechanism for "obtaining compensation" for the value of the land or other piece of tangible property that the government has taken. *Williamson County*, 473 U.S.

at 194. But when the government takes *money* from an individual—by imposing a fine, penalty, or other obligation to pay—there is nothing to exchange. Rather, "'[e]very dollar paid pursuant to a statute would be presumed to generate a dollar of Tucker Act compensation.'" *Apfel*, 524 U.S. at 521 (quoting *In re Chateaugay Corp.*, 53 F.3d 478, 493 (2d Cir. 1995)). The only "just compensation" for a taking of money is to give the money right back!

Requiring a separate suit for damages to recover money taken in a prior proceeding would thus entail not a "reasonable, certain and adequate provision for obtaining compensation" (*Williamson County*, 437 U.S. at 194 (quoting *Regional Rail Reorg. Act Cases*, 419 U.S. 102, 124-125 (1974)), but "an utterly pointless set of activities." *Apfel*, 524 U.S. at 521 (quotation omitted). The property owner would have to pay the money to the government in one proceeding, and then file a separate suit under the Tucker Act to get the money back—all before it could argue that the money should not have been taken in the first place.

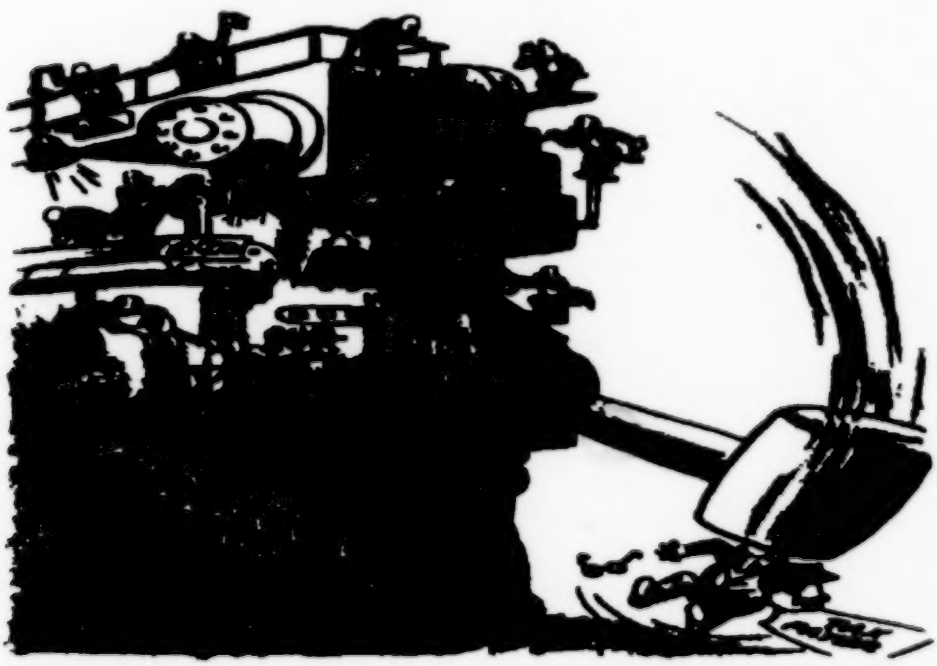
This Rube Goldberg approach[2] to adjudicating takings claims serves no useful purpose.

Moreover, bad matters are made worse where the Takings Clause is raised as a defense to a fine imposed by an agency. Here, for example, petitioners would have to litigate all of their other statutory and constitutional defenses to the agency action in district court pursuant to the usual judicial review procedures. 7 U.S.C. § 608c(15)(B) (2006). If they did not prevail, petitioners would have to pay the fine levied against them. Only after handing over their money would petitioners be able to begin a second round of litigation in the Court of Federal Claims to get the money back, this time raising their takings defense.

Deeming the takings defense "unripe" thus requires related claims to be adjudicated in two entirely separate proceedings. It requires courts to reach

---

2



multiple potentially complex statutory and constitutional defenses in the proceeding to impose the fine, while deferring a dispositive issue that may be more easily resolved. Cf., *e.g.*, *Apfel*, 524 U.S. at 538 (holding that because "the Coal Act's allocation scheme violates the Takings Clause as applied to Eastern, we need not address Eastern's due process claim"). And it requires property owners to run a gauntlet of successive, piecemeal litigation before receiving a final determination that they are entitled to keep their own money after all.

In addition to these inefficiencies, this bifurcated approach to litigation means that related issues must be resolved in two separate forums. The chief question in takings cases involving money is not how much money the government must pay to provide just compensation, as a dollar taken is a dollar owed. Instead, the question is whether a given statutory scheme or agency action effectuates a "taking" in the first place. Making that determination often entails comprehensive analysis of a statutory scheme and its effect on property owners—the same kind of analysis district courts typically undertake in judicial review proceedings addressing a property owner's other claims. See, *e.g.*, *Apfel*, 524 U.S. at 522-537 (examining the "economic impact of the regulation, its interference with reasonable investment backed expectations, and the character of the governmental action" to determine whether a taking has occurred). This case is a perfect example, particularly given the Ninth Circuit's confused conclusion that it would have had jurisdiction over a takings claim made by petitioners "in their capacity as handlers," while only the Court of Federal Claims may hear a claim that

"the reserve program injures them in their capacity as producers." See JA305-306.

Not only is it inefficient to have two different courts, subject to the law of two different circuits, decide such overlapping issues, but it also invites confusion and further litigation over the collateral estoppel or res judicata effect of portions of a prior decision. Cf. *San Remo Hotel, L.P.* v. *City & Cnty. of S.F., Cal.*, 545 U.S. 323, 351 (2005) (Rehnquist, C.J., concurring) ("litigants who go to state court to seek compensation will likely be unable later to assert their federal takings claims in federal court").

Further, it increases the difficulty of harmonizing a statutory scheme with the Constitution. If statutory and constitutional issues must be decided in separate proceedings, district courts will have to interpret statutes without regard to their constitutionality and the Court of Federal Claims will have to address constitutional problems without being able to avoid them by adopting a saving construction. The Ninth's Circuit's bifurcated approach to litigation involving takings of money thus flies in the face of this Court's teaching that "every reasonable construction must be resorted to, in order to save a statute from unconstitutionality." *Hooper* v. *California*, 155 U.S. 648, 657 (1895).

The ripeness doctrine is supposed to ensure that disputes are resolved when they are most "fit[] * * * for judicial decision." *Abbott Labs.* v. *Gardner*, 387 U.S. 136, 149 (1967). But requiring a separate suit to challenge takings of money does not serve that purpose. It requires takings claims to be raised when they are *least* fit for review. And it does so in a manner that is "utterly pointless," as there is simply no

legal or factual question to be resolved in a Tucker Act suit that cannot be resolved earlier in the district court. *Apfel*, 524 U.S. at 521. The decision below must be reversed.

B. Individuals and small business owners should not have to shoulder the burden of litigating against the government twice.

1. Requiring a separate suit for compensation is in fact worse than pointless. It forces property owners to suffer the hardship of litigating against the government twice—no light burden for small raisin farmers such as petitioners, and an even heavier burden for many other ordinary citizens and small businesses.

Studies have shown that small businesses are already faced with enormous litigation costs. In 2008, for example, small businesses faced $105.4 billion in costs from tort lawsuits alone. U.S. Chamber Inst. for Legal Reform, *Tort Liability Costs for Small Business* at 1 (July 2010). More than a third of small businesses surveyed have been sued, and 73% of those sued reported that their business suffered due to the time and expense of litigation. *Id.* at 2. Further, the Small Business Administration has found that "litigation causes not just financial loss, but * * * substantial emotional hardship, and often changes the tone of the business." Klemm Analysis Group, Small Business Association Office of Advocacy, *Impact of Litigation on Small Business* at 12 (Oct. 2005). Because of the time, expense, and disruption of litigation, small business owners "go to great lengths to stay out of court"—sometimes by forgoing their own legal rights. *Ibid.* And while going to court is sometimes unavoidable, common sense and basic fairness

counsel in favor of resolving disputed claims in one suit, rather than two, whenever possible.

2. In addition to the costs of litigation in general, individuals and small businesses also face a number of special burdens in litigating takings claims in particular.

First, obtaining compensation can take a very long time. In one recent case, for example, a Tucker Act claim filed by two ranchers in 1991 took "almost twenty years of litigation," culminating in a recent decision that the claim was *still* not ripe because the ranchers had not exhausted all administrative remedies. *Estate of Hage* v. *United States*, 687 F.3d 1281, 1285-1292 (Fed. Cir. 2012). Even if more litigation eventually results in compensation, however, it will be too late: Both ranchers have since died. See Sandra Chereb, *Wayne Hage, Nevada Rancher and Sagebrush Rebel, Dies*, The Associated Press (June 6, 2006).[3] A twenty-year delay may be unusual, but substantial delay in recovering compensation is *not*. *E.g.*, *Bowles* v. *United States*, 31 Fed. Cl. 37, 52 (1994) (noting "long delay").

Second, litigating compensation can be costly. For example, when Minnesota took from David Luse five acres that he and his wife had owned for twenty years, he had to spend $100,000 in attorney and appraisal fees before eventually receiving $845,000 in compensation. Dan Browning, *MnDOT's Tactics Squeeze Landowners*, Minneapolis Star Tribune (Sept. 20, 2003).[4] Another Minnesotan had to spend

---

[3] Available at: www.propertyrightsresearch.org/2006/articles06/wayne_hage.htm.

[4] Available at: www.startribune.com/local/11574556.html.

over $50,000 to secure just compensation. *Ibid.*; see also *Holman* v. *City of Warrenton*, 242 F. Supp. 2d 791, 808 (D. Or. 2002) (describing inverse condemnation process as "time-consuming and expensive"). Making matters worse, property owners often cannot recoup these litigation costs, even when they prevail. See Abraham Bell & Gideon Parchomovsky, *Taking Compensation Private*, 59 Stan. L. Rev. 871, 890 & n.108 (2007) (noting that only sixteen States have enacted statutes awarding full or partial reimbursement in eminent domain litigation).

Even if full compensation is eventually paid, it can be extremely burdensome for a cash-strapped property owner—particularly one who loses a home or business—to await that day. One small business owner who lost his shop in West Virginia, for example, "worried about being able to find a new property at the drop of a hat" because he could not afford to pay upfront a second rent, remodel a new shop, and cover the lost revenue from the 30 days his business would have to close for the move. Jillian Swords, *Eminent Domain Leaves Businesses Homeless*, The Appalachian (Feb. 12, 2008).[5] Similarly, an elderly couple in North Carolina was left homeless when their farm was taken to expand a landfill. Lynnette Taylor, *Eminent Domain Case Leaves Surry County Family Homeless*, WITN (Nov. 17, 2007).[6] They stayed on the farm, only to be ordered to pay rent on their own property to the government.

---

[5] Available at: www.theappalachianonline.com/community/3251-eminent-domain-leaves-businesses-homeless.

[6] Available at: www.witn.com/home/headlines/11533181.html.

As these examples suggest, the costs imposed on property owners are not just financial: Takings accompanied by no more than a vague prospect of future compensation are extremely demoralizing. Just as "predeprivation process may serve the purpose of making an individual feel that the government has dealt with him fairly," predeprivation compensation does the same. *Williamson County*, 473 U.S. at 195 n.14. As Professor Michelman famously observed, "demoralization costs" should not be neglected in the takings calculus. Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 Harv. L. Rev. 1165, 1214 (1967).

3. Such burdens are also likely to be felt by the most vulnerable, as eminent domain disproportionately targets "ethnic or racial minorities" and those who "have completed significantly less education, live on significantly less income, and live at or below the federal poverty line." Dick M. Carpenter II & John K. Ross, Victimizing the Vulnerable 2 (2007).[7] The costs, delays, and complications of seeking compensation are often imposed on those least equipped to bear them, and on those least able to await belated compensation. See also Ilya Shapiro & Carl G. DeNigris, *Occupy Pennsylvania Avenue: How the Government's Unconstitutional Actions Harm the 99%*, 60 Drake L. Rev. 1085 (2012) (showing how an assortment of well-meaning policies end up imposing the greatest harm on those who can least afford it).

4. There is no reason to multiply these burdens by forcing individuals and small business owners to

---

[7] Available at: www.ij.org/images/pdf_folder/other_pubs/Victimizing_the_Vulnerable.pdf.

suffer through *two* rounds of litigation against the government before they can vindicate their constitutional rights. One is enough.

Indeed, the burden is particularly perverse here, where the government itself initiated the underlying administrative proceedings that led petitioners to assert a taking. Ripeness is supposed to be a shield that protects the government from having to litigate hypothetical disputes. *Nat'l Park Hospitality Ass'n* v. *Dep't of the Interior*, 538 U.S. 803, 808 (2003) (deeming controversy ripe when "factual components [are] fleshed out * * * in a fashion that harms or threatens to harm" a party). But here *the government* was the instigator. It launched proceedings to seize petitioners' property—and then used "ripeness" as a sword to force petitioners to hand over that money without consideration of their Takings Clause defense. This invocation of ripeness can only be described as Kafkaesque.

In short, for many cash-strapped individuals and small businesses, being forced to give up money in advance is catastrophic. And for many more, a second lawsuit involving a further outlay of resources may not be cost-justified, if even possible. A ripeness bar may thus have the effect of insulating an unconstitutional taking from judicial review. For many property owners, justice delayed truly is justice denied.

II. The Ninth Circuit's extension of *Williamson County* has no basis in the Constitution's text and structure, or in ripeness doctrine generally.

The Ninth Circuit has rationalized these unnecessary burdens on the ground that "the government is

not prohibited from taking private property * * * so long as it pays compensation" eventually. *Bay View*, 105 F.3d at 1284-1285. Under this theory, the Fifth Amendment's textual prohibition on taking property "without just compensation" is not violated unless and until the government fails to pay compensation through the Tucker Act at some later date, and no takings claim is ripe until that occurs.

But even if this were true of takings of real or tangible personal property (and it is not), a fine or taking of money is a taking "without just compensation" at the very moment it occurs. Common sense and ripeness doctrine both confirm that this is so. So do the text and history of the Takings Clause, as well as this Court's interpretation of the similarly-worded Due Process Clause.

A. Property owners should not be required to suffer a violation of their constitutional rights before being allowed to raise those rights.

1. When the government requires a payment of money, the government obviously has "no intention of providing compensation for the deprivation through the Tucker Act." *Chateaugay*, 53 F.3d at 493. This is "[c]ommon sense," as paying compensation for a monetary taking "would tend to nullify" the very government action that effectuated it. *Ibid.*; see also *Wash. Legal Found.* v. *Tex. Equal Access to Justice Found.*, 270 F.3d 180, 194 (5th Cir. 2001) (holding that, when the government takes money, "it would defy logic, to say the least, to presume the availability of a just compensation remedy"), *vacated on other grounds*, 538 U.S. 942 (2003).

Although it may be reasonable to assume that the government will pay compensation after it takes someone's land, it is absurd to assume that the government will choose to return a fine that it has imposed. The fine itself is inherently a taking "without just compensation" under the language of the Takings Clause. And that being so, the constitutional challenge to the taking is immediately ripe.

For takings of real or physical property, the Tucker Act may avoid a constitutional injury by paying genuine *compensation*. But for takings that require the payment of money—again, an inherently uncompensated taking—the Tucker Act becomes something very different: It is just a means of recovering *damages* for a constitutional injury that has already occurred. See *Apfel*, 524 U.S. at 521 ("it cannot be said that monetary relief against the Government is an available remedy" for a monetary taking simply because the Tucker Act authorizes suits for damages against the government). In this context, the Tucker Act remedy does not *ripen* a constitutional issue; it merely *resolves* one—after the constitutional injury has already occurred.

2. In any event, ripeness principles have never required an individual to suffer a constitutional injury before bringing suit. It is enough to establish a realistic *threat* of injury.

As this Court explained long ago, one "does not have to await the consummation of threatened injury to obtain preventive relief." *Carter* v. *Carter Coal Co.*, 298 U.S. 238, 288 (1936). Rather, "[i]f the injury is certainly impending, that is enough." *Ibid.* In no other context must an individual suffer a completed violation of his constitutional rights before he is per-

mitted to assert them. See, *e.g.*, *Steffel* v. *Thompson*, 415 U.S. 452, 462-463 (1974) (permitting First Amendment challenge to criminal statute before prosecution); *Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520 (1993) (Free Exercise Clause); *McDonald* v. *City of Chicago*, 130 S. Ct. 3020, 3026-3027 (2010) (Second Amendment); *Albertson* v. *Subversive Activities Control Bd.*, 382 U.S. 70, 73-76 (1965) (Fifth Amendment right against self-incrimination); *Pierce* v. *Soc'y of Sisters*, 268 U.S. 510, 536 (1925) (substantive due process); *Duke Power*, 438 U.S. at 67-68, 81-82 (procedural due process).

3. That is particularly true where an individual asserts his constitutional rights as a *defense* in an enforcement action brought by the government. This posture involves none of the usual concerns about the justiciability of pre-enforcement review; enforcement has already commenced, and the relevant statutory process has been followed. It is thus highly anomalous to forbid an individual from raising a takings defense in proceedings that seek to impose a fine. Indeed, "[d]ue process requires that there be an opportunity to present every available defense." *Lindsey* v. *Normet*, 405 U.S. 56, 66 (1972) (quotation omitted).

When the government commences an enforcement action to impose a monetary penalty and one objects to that penalty on First Amendment grounds, for example, it would be unthinkable to require that the penalty be paid simply because one can sue for damages later. See *United States* v. *United Foods, Inc.*, 533 U.S. 405 (2001) (addressing First Amendment challenge to marketing order that imposed assessments on handlers of mushrooms, where challenge was raised as defense to enforcement action). There

is no reason to treat the Takings Clause any differently.

Indeed, the author of the Takings Clause emphasized that "[g]overnment is instituted no less for protection of the property than of the persons of the individuals." The Federalist No. 54, at 339 (James Madison) (Clinton Rossiter ed. 1961). Similarly, John Adams observed that "[p]roperty must be secured or liberty cannot exist." John Adams, *Discourses on Davila*, in 6 The Works of John Adams, Second President of the United States 221, 280 (Charles Francis Adams ed. 1851). The other Framers held similar views. See, *e.g.*, Gouverneur Morris, The Records of the Federal Convention of 1787, at 533 (Max Farrand ed. 2d ed., 1937) (protection of property is "the main object of society"). In short, nothing in the history of the Fifth Amendment suggests that, when applying principles of ripeness, the Takings Clause should be relegated to second-class constitutional status.

Not surprisingly, then, this Court has often reached the merits of Takings Clause defenses without noting any ripeness problem. See *Bennis* v. *Michigan*, 516 U.S. 442, 452-453 (1996) (takings claim raised as defense to asset forfeiture action); *FCC* v. *Fla. Power Corp.*, 480 U.S. 245, 253-254 (1987) (takings claim addressed in response to FCC rate-setting order); *Kaiser Aetna* v. *United States*, 444 U.S. 164, 174-175 (1979) (takings claim addressed in suit by federal government over public access to marina); *Goldblatt* v. *Town of Hempstead, N.Y.*, 369 U.S. 590, 594 (1962) (takings defense raised in action to enjoin defendant from operating a sand and gravel pit without a permit).

The same ripeness rules that govern other constitutional claims should govern claims for takings, particularly where those claims are asserted as a *defense* to imminent government action. In fact, as shown below, it is questionable whether *Williamson County*'s special rule for takings claims should exist at all, even for claims based on real or physical property.

B. The text and history of the Takings Clause do not permit the government to defer compensation until after a taking has occurred.

1. At its core, *Williamson County*'s holding rests on a mistaken premise—that the Fifth Amendment does not require actual compensation at the time of a taking; instead, "all that is required" is a "process" by which an aggrieved property owner might (or might not) later obtain compensation. 473 U.S. at 194. In other words, the government may take first and ask questions later. And the onus is on the property owner to avail herself of state or federal "process" in hopes of ultimately receiving something in return.

In assuming that no compensation is required at the time of a taking, *Williamson County* purported to rely on the "nature of the constitutional right" protected by the Takings Clause. But the text of the Takings Clause suggests nothing of the sort. See *San Remo Hotel*, 545 U.S. at 349 (Rehnquist, C.J., concurring) (noting that, although "*Williamson County* purported to interpret the Fifth Amendment," its interpretation is "not obvious"); *Wilkie* v. *Robbins*, 551 U.S. 537, 583 (2007) (Ginsburg, J. dissenting) ("Correlative to the right to be compensated for a taking is the right to refuse to submit to a taking where no compensation is in the offing.").

The Takings Clause provides: "[N]or shall private property be taken for public use, without just compensation." The most natural reading of this language is that "compensation" is a prerequisite that the government must satisfy when it effects a taking —not merely a process to be made available at some future date. Far from merely establishing the right to a post-taking damages remedy requiring lengthy court proceedings, the text of the Takings Clause suggests no temporal separation between the taking and the payment of compensation. And it certainly does not compel the conclusion that compensation may always be paid at some indefinite later time.

2. This understanding of the Takings Clause, moreover, comports with how it was understood for at least a century after the Bill of Rights was enacted. As one early court explained: "[A]s an original question, it seems clear that the proper interpretation of the Constitution requires that the owner should receive his just compensation *before* entry upon his property." *Md. & Wash. Ry. Co.* v. *Hiller*, 8 App. D.C. 289, 294 (C.A.D.C. 1896) (emphasis added); see also Robert Brauneis, *The First Constitutional Tort: The Remedial Revolution in Nineteenth-Century State Just Compensation Law*, 52 Vand. L. Rev. 57, 60 (1999) (concluding that "for most of the nineteenth century, just compensation clauses were generally understood not to create remedial duties, but to impose legislative disabilities"); Phillip Nichols, The Law of Eminent Domain 1038 (1917) (citing cases involving the Takings Clause and concluding that "[i]t is not * * * obligatory upon an owner of land who is being deprived of his property * * * in violation of the restriction imposed upon the states by the federal constitution, to first invoke the protection of the state

court, but * * * he may institute proceedings at once in the federal court to enjoin the threatened injury").

In fact, that understanding dates as far back as Magna Carta, which provided that "[n]o constable or other royal official shall take corn or other movable goods from any man without *immediate payment*." Magna Carta, Cl. 28 (1215) (emphasis added).

C. There is no reason to treat the Takings and Due Process Clauses differently.

Not only is belated compensation unsupported by the text and history of the Takings Clause; it is also discordant with this Court's treatment of analogous language in the Due Process Clause. Just as property may not be taken "without just compensation," it may not be taken "without due process of law." Yet, unlike the Takings Clause, "the Court usually has held that the [Due Process Clause] requires some kind of a hearing *before* the State deprives a person of liberty or property." *Zinermon* v. *Burch*, 494 U.S. 113, 128 (1990) (citing cases); see also *Baker* v. *McCollan*, 443 U.S. 137, 145 (1979) ("The Fourteenth Amendment does not protect against all deprivations of liberty. It protects only against deprivations of liberty accomplished 'without due process of law.'").

In candor, this Court has not justified treating due process as a prerequisite to government deprivations of property while treating compensation as something to be provided later. *Williamson County* sidestepped this question by analogizing to *Parratt* v. *Taylor*, 451 U.S. 527 (1981), a due process case holding that a deprivation of property was justified by "the provision of meaningful postdeprivation process." 473 U.S. at 195. Since *Williamson County*, however, this Court has made clear that *Parratt* applies only to situations

where the government is *unable* to provide pre-deprivation process. *Zinermon*, 494 U.S. at 132. "In situations where the State feasibly can provide a predeprivation hearing before taking property, it generally must do so regardless of the adequacy of a postdeprivation tort remedy to compensate for the taking." *Ibid.* The same rule should apply to the Takings Clause.

At a minimum, that rule should apply here, where a predeprivation hearing is not only "feasible," but actually occurs—and occurs as a result of an enforcement action *brought by the government* to impose a fine. *Williamson County* suggested that, unlike in due process cases, "the Court has [n]ever recognized any interest served by pretaking compensation that could not be equally well served by post-taking compensation." 473 U.S. at 195 n.14. As explained above, however, real-world experience in the years since *Williamson County* shows that property owners in fact suffer substantial burdens in their efforts to recover compensation. Requiring property owners to pay the fine and pursue a post-deprivation Tucker Act remedy serves no legitimate purpose, and it imposes a burden on property owners that they should not be required to bear.

* * * * *

In sum, *Williamson County* is unsupportable as a matter of constitutional text, structure, history, and purpose. Moreover, it is unworkable in practice and imposes unwarranted burdens on property owners, particularly those of limited means. Accordingly, rather than merely confirming that *Williamson County* does not apply to a "direct transfer of funds mandated by the Government" (*Apfel*, 524 U.S. at 521), the

Court should take this opportunity to overrule *Williamson County* outright. See *Payne* v. *Tennessee*, 501 U.S. 808, 827 (1991) (explaining that precedents may be overruled when they "are unworkable or are badly reasoned").

At a minimum, however, the *Williamson County* ripeness rule should not be expanded from its original rationale, which is limited to real property. And it certainly ought not preclude property owners like petitioners from defending themselves where the government itself has initiated proceedings and sought to impose a monetary sanction.

CONCLUSION

For the foregoing reasons, the judgment below should be reversed.

Respectfully submitted.

WILLIAM P. FERRANTI
Winston & Strawn LLP
35 W. Wacker Drive
Chicago, IL 60601
(312) 558-5600

STEFFEN N. JOHNSON
Counsel of Record
JACOB R. LOSHIN
Winston & Strawn LLP
1700 K Street, N.W.
Washington, DC 20006
(202) 282-5000
sjohnson@winston.com

Counsel for Amici Curiae

ILYA SHAPIRO
Cato Institute
1000 Mass. Ave.
Washington, DC 20001
(202) 842-0200
ishapiro@cato.org

Counsel for Cato Institute

KAREN R. HARNED
ELIZABETH MILITO
NFIB Small Business Legal Center
1201 F St., NW, Ste. 200
Washington, DC 20004
(202) 406-4443
elizabeth.milito@nfib.org

Counsel for National Federation of Independent Business

JOHN C. EASTMAN
Center for Constitutional Jurisprudence
c/o Chapman University School of Law
One University Drive
Orange, CA 92886
(714) 628-2500
jeastman@chapman.edu

Counsel for Center for Constitutional Jurisprudence

MANUEL S. KLAUSNER
Law Offices of Manuel S. Klausner, P.C.
One Bunker Hill Bldg.
601 West Fifth Street
Los Angeles, CA 90071
(213) 617-0414
mklausner@klausnerinc.com

Counsel for Reason Foundation

JANUARY 2013

APPENDIX

APPENDIX: LIST OF *AMICI*

The *Cato Institute* was established in 1977 as a nonpartisan public-policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences, publishes the annual *Cato Supreme Court Review*, and files amicus briefs, including in various property rights cases. This case is of central concern to Cato because it implicates constitutional safeguards against wrongful takings.

The *National Federation of Independent Business* (NFIB) is the nation's leading small business association, representing members in Washington, D.C., and all 50 state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate and grow their businesses. NFIB represents about 350,000 member businesses nationwide, and its membership spans the spectrum of business operations, ranging from sole proprietor enterprises to firms with hundreds of employees. While there is no standard definition of a "small business," the typical NFIB member employs 10 people and reports gross sales of about $500,000 a year. The NFIB membership is a reflection of American small business.

The *National Federation of Independent Business Small Business Legal Center* (NFIB Legal Center) is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts on issues of public

interest affecting small businesses. To fulfill its role as the voice for small business, the NFIB Legal Center frequently files amicus briefs in cases that will impact small businesses.

The *Center for Constitutional Jurisprudence* is the public interest law arm of the Claremont Institute, the mission of which is to restore the principles of the American Founding to their rightful and preeminent authority in our national life, including the proposition expressed in the Fifth Amendment that private property can be taken only for public use, and then only upon payment of just compensation. In addition to providing counsel for parties at all levels of state and federal courts, the Center has participated as *amicus curiae* before this Court in several cases of constitutional significance, including *Kelo* v. *City of New London, Connecticut*, 545 U.S. 469 (2005), and *Rapanos* v. *United States*, 547 U.S. 715 (2006).

The *Reason Foundation* is a national, nonpartisan, and nonprofit public policy think tank, founded in 1978. Reason's mission is to advance a free society by developing, applying, and promoting libertarian principles and policies—including free markets, individual liberty, and the rule of law. Reason supports dynamic market-based public policies that allow and encourage individuals and voluntary institutions to flourish. Reason advances its mission by publishing *Reason* magazine, as well as commentary on its websites, *www.reason.com* and *www.reason.tv*, and by issuing policy research reports. To further Reason's commitment to "Free Minds and Free Markets," Reason selectively participates as amicus curiae in cases raising significant constitutional issues.

AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

Supreme Court, U.S.
FILED
JAN 16 2013
OFFICE OF THE CLERK

No. 12-123

In the Supreme Court of the United States

MARVIN D. HORNE, ET AL., PETITIONERS

v.

UNITED STATES DEPARTMENT OF AGRICULTURE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

ROBIN S. CONRAD
RACHEL L. BRAND
SHELDON GILBERT
NATIONAL CHAMBER
LITIGATION CENTER
1615 H Street, NW
Washington, DC 20063
(202) 463-5337

JOHN P. ELWOOD
Counsel of Record
JEREMY C. MARWELL
VINSON & ELKINS LLP
2200 Pennsylvania Ave., NW, Suite 500 West
Washington, DC 20037
(202) 639-6500
jelwood@velaw.com

J. ERIC PARDUE
VINSON & ELKINS LLP
1001 Fannin Street, Suite 2500
Houston, TX 77002

Attorneys for Amicus Curiae Chamber of Commerce of the United States of America

Library of Congress
Law Library

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES III

INTEREST OF *AMICUS CURIAE* 1

BACKGROUND 2

SUMMARY OF ARGUMENT 5

ARGUMENT 6

I. When The Government Directs The Payment Of Money In An Enforcement Action, A Party Can Raise The Takings Clause As A Defense 8

A. The Plurality Opinion In *Apfel* Provides A Sufficient Rule Of Decision For This Case 9

B. The *Apfel* Plurality's Rationale Accords With The Longstanding Rule That A Party May Challenge The Imposition Of A Fine At The Time It Is Imposed 13

II. Requiring Petitioners To Pay the Fine and Pursue A Duplicative Second Lawsuit Would Substantially Burden Fifth Amendment Rights 21

A. Constitutional Avoidance 21

B. Administrative Exhaustion 22

C. Time and Expense Of Vindicating Rights 23

D. Preclusion 25

III. The Ninth Circuit's Rule Would Adversely Affect Property Rights In A Wide Range of Circumstances 28

A. Property Owners Face Government-Directed "Transfer[s] of Funds" In A Variety of Contexts 28

B. The Raisin Marketing Order Raises Significant Constitutional Concerns 32

CONCLUSION 36

TABLE OF AUTHORITIES

Cases **Page(s)**

Abbott Labs. v. *Gardner*,
387 U.S. 136 (1967) 16, 17, 18

Aircraft & Diesel Equip. Corp. v. *Hirsch*,
331 U.S. 752 (1947) 22

Allen v. *McCurry*,
449 U.S. 90 (1980) 19

Ark. Game & Fish Comm'n v. *United States*,
133 S. Ct. 511 (2012) 28, 32, 34

Babbitt v. *Youpee*,
519 U.S. 234 (1997) 10

Bowen v. *Massachusetts*,
487 U.S. 879 (1988) 11

Brillhart v. *Excess Ins. Co. of Am.*,
316 U.S. 491 (1942) 21

Brown v. *Legal Found. of Wash.*,
538 U.S. 216 (2003) 33

Cal. Bankers Ass'n v. *Shultz*,
416 U.S. 21 (1974) 17

Colo. River Water Conservation Dist.
v. *United States*,
424 U.S. 800 (1976) 19

Concrete Pipe & Prods. of Cal., Inc. v. *Constr. Laborers Pension Trust for S. Cal.*,
508 U.S. 602 (1993) 11

Cases—Continued: **Page(s)**

Connolly v. *Pension Benefit Guar. Corp.*,
475 U.S. 211 (1986) 11, 33

Curtis v. *Citibank, N.A.*,
226 F.3d 133 (2d Cir. 2000) 20

Doe v. *United States*,
372 F.3d 1308 (Fed. Cir. 2004) 11

Dolan v. *City of Tigard*,
512 U.S. 374 (1994) 35

Duke Power Co. v. *Carolina Envtl. Study Grp., Inc.*,
438 U.S. 59 (1978) 11

Eastern Enterprises v. *Apfel*,
524 U.S. 498 (1998) ..... *passim*

Edward J. DeBartolo Corp. v. *Fla. Gulf Coast Bldg. & Constr. Trades Council*,
485 U.S. 568 (1988) 21

Evans v. *United States*,
74 Fed. Cl. 554 (2006) 33, 34, 35

Ex parte Young,
209 U.S. 123 (1908) 15

Fern v. *Turman*,
736 F.2d 1367 (9th Cir. 1984) 20

Gonzales v. *Raich*,
545 U.S. 1 (2005) 35

Hodel v. *Irving*,
481 U.S. 704 (1987) 10

Cases—Continued: **Page(s)**

In re Chateaugay Corp.,
53 F.3d 478 (2d Cir. 1995) 10, 12

Kerotest Mfg. Co. v. *C-O-Two Fire Equip. Co.*,
342 U.S. 180 (1952) 20

Klump v. *United States*,
38 Fed. Cl. 243 (1997) 26

Loretto v. *Teleprompter Manhattan CATV Corp.*,
458 U.S. 419 (1982) 26, 32, 33, 35

MacDonald, Sommer & Frates v. *Yolo Cnty.*,
477 U.S. 340 (1986) 24, 27

McKart v. *United States*,
395 U.S. 185 (1969) 23

Missouri Pacific Railway Co. v. *Nebraska*,
217 U.S. 196 (1910) 13, 14

Mohawk Indus., Inc. v. *Carpenter*,
130 S. Ct. 599 (2009) 20

Nixon v. *United States*,
978 F.2d 1269 (D.C. Cir. 1992) 33

Nova Prods., Inc. v. *Kisma Video, Inc.*,
220 F.R.D. 238 (S.D.N.Y. 2004) 20

Pac. Gas & Elec. Co. v. *State Energy Res. Conservation & Dev. Comm'n*,
461 U.S. 190 (1983) 16

Palka v. *City of Chi.*,
662 F.3d 428 (7th Cir. 2011) 19

Cases—Continued: **Page(s)**

Paradissiotis v. *United States*,
49 Fed. Cl. 16 (2001) 26

Prakash v. *Am. Univ.*,
727 F.2d 1174 (D.C. Cir. 1984) 20

Preseault v. *Interstate Commerce Comm'n*,
494 U.S. 1 (1990) 21

Pub. Utils. Comm'n of Cal. v. *United States*,
355 U.S. 534 (1958) 22

Ruckelshaus v. *Monsanto Co.*,
467 U.S. 986 (1984) ..... *passim*

Russo Development Corp. v. *Thomas*,
735 F. Supp. 631 (D.N.J. 1989) 31

Sackett v. *EPA*,
132 S. Ct. 1367 (2012) 15, 17, 24

San Remo Hotel, L.P. v. *City & Cnty. of S.F.*,
545 U.S. 323 (2005) 19, 24, 27

Stop the Beach Renourishment, Inc. v.
Fla. Dep't of Envtl. Prot.,
130 S. Ct. 2592 (2010) 36

Student Loan Mktg. Ass'n v. *Riley*,
104 F.3d 397 (D.C. Cir. 1997) 10, 11

Swisher Int'l, Inc. v. *Schafer*,
550 F.3d 1046 (11th Cir. 2008) 30

Tahoe-Sierra Pres. Council, Inc. v.
Tahoe Reg'l Planning Agency,
535 U.S. 302 (2002) 32

Cases—Continued: **Page(s)**

Traficanti v. *United States*,
227 F.3d 170 (4th Cir. 2000) 17, 30

United Mine Workers of Am. v. *Gibbs*,
383 U.S. 715 (1966) 20

United States v. *Am. Elec. Power Serv. Corp.*,
218 F. Supp. 2d 931 (S.D. Ohio 2002) 31

United States v. *Causby*,
328 U.S. 256 (1946) 36

United States v. *Gen. Motors Corp.*,
323 U.S. 373 (1945) 33

United States v. *Louisiana-Pacific Corp.*,
967 F.2d 1372 (9th Cir. 1992) 15

United States v. *Native Wholesale Supply Co.*,
822 F. Supp. 2d 326 (W.D.N.Y. 2011) 30

United States v. *Riverside Bayview Homes, Inc.*,
474 U.S. 121 (1985) 22

United States v. *Ruzicka*,
329 U.S. 287 (1946) 18

United States v. *Sec. Indus. Bank*,
459 U.S. 70 (1982) 22

W. Va. CWP Fund v. *Stacy*,
671 F.3d 378 (4th Cir. 2011) 29

Wadley S. Ry. Co. v. *Georgia*,
235 U.S. 651 (1915) 15, 24

Wallace v. *Hudson-Duncan & Co.*,
98 F.2d 985 (9th Cir. 1938) 35

Cases—Continued: **Page(s)**

Wickard v. *Filburn*,
317 U.S. 111 (1942) 35

Williamson County Regional Planning Comm'n v. *Hamilton Bank of Johnson City*,
473 U.S. 172 (1985) 4, 7, 8

Wisconsin v. *Yoder*,
406 U.S. 205 (1972) 34

Woodford v. *Ngo*,
548 U.S. 81 (2006) 23

Yee v. *City of Escondido*,
503 U.S. 519 (1992) 34

Statutes and Constitutional Provisions

28 U.S.C. § 1738 27

30 U.S.C. §§ 901–944 28

7 U.S.C. § 518 29

7 U.S.C. § 518d 30

7 U.S.C. § 601 2

7 U.S.C. § 608c 4, 17, 18

7 U.S.C. §§ 3001-3007 3

U.S. Const. amend. V 8

Rules

7 C.F.R. § 1463.3 30

7 C.F.R. § 1463.4 30

Rules—Continued: **Page(s)**

7 C.F.R. § 989.54 34
7 C.F.R. § 989.65 34
7 C.F.R. § 989.66 ..... 2, 3, 34
7 C.F.R. § 989.67 34
7 C.F.R. pt. 989 2

Other Authorities

Erwin Chemerinsky, *Constitutional Law* (3d ed. 2006) 17
Fed. R. Civ. P. 14 20
Fed. R. Civ. P. 42 20
Timothy V. Kassouni, *The Ripeness Doctrine and the Judicial Relegation of Constitutionally Protected Property Rights*, 29 Cal. W. L. Rev. 1, 3 (1992) 16

INTEREST OF *AMICUS CURIAE*[1]

Founded in 1912, the Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation. The Chamber represents 300,000 direct members and indirectly represents an underlying membership of more than three million businesses and professional organizations of every size, in every industry sector, and from every region of the country. More than 96 percent of the Chamber's members are small businesses with 100 or fewer employees. The Chamber represents the interests of its members in matters before Congress, the Executive Branch, and the courts. The Chamber regularly files *amicus* briefs in cases that raise issues of vital concern to the Nation's business community, including cases addressing protections for private property rights against infringement by the federal, state, and local governments.

The Chamber and its members have a substantial interest in ensuring that property owners retain an adequate, efficient, and prompt remedy against unconstitutional government takings of property. The property rights of Chamber members are subject to infringement in a wide range of areas, including laws under which the government may seek monetary fines or penalties. The court of appeals in this case held that petitioners could not raise the Takings Clause of the Fifth Amendment as a defense to a gov-

---

[1] No counsel for a party authored this brief in whole or part, and no counsel or party made a monetary contribution to fund the preparation or submission of this brief. No person other than the *amicus curiae*, its members, and its counsel made any monetary contribution to its preparation and submission. The parties have consented to this filing.

ernment-mandated transfer of funds, but rather were required to pay the sums and then bring a second lawsuit to litigate the Takings Clause question by seeking reimbursement in the Court of Federal Claims. That rule is of great concern to the Chamber and its members because, if upheld, it would substantially burden Fifth Amendment rights, with wide-ranging consequences for private property interests nationwide.

BACKGROUND

Under the Agricultural Marketing Agreement Act of 1937 ("AMAA") and its implementing regulations, "handlers" of raisins in California must turn over to "the account" of a committee appointed by the United States Department of Agriculture ("USDA") a portion of the annual raisin crop. See 7 U.S.C. § 601 *et seq.*; Marketing Order Regulating the Handling of Raisins Produced from Grapes Grown in California, 7 C.F.R. pt. 989 ("Raisin Marketing Order" or "Order"). In this way, the federal government establishes annual "reserve" pools of raisins, title to which effectively passes from raisin producers to the government's Raisin Administrative Committee ("RAC") to dispose of as it sees fit. 7 C.F.R. § 989.66(a), (b)(1), (b)(4). For the two years at issue in this case (2002-2003 and 2003-2004), the "reserve" percentage of the raisin crop was 47 and 30 percent, respectively. J.A. 84–85. In 2003-2004, the government paid growers precisely $0 for the 30 percent of that year's raisin crop (some 38.5 million tons) that it appropriated for the "reserve" pool. Pet. Br. 6.

In this case, the Administrator of the Agricultural Marketing Service brought a federal enforcement action alleging that petitioners—independent California raisin producers—failed to comply with the Raisin Marketing Order's reserve-pool requirements in 2002-2003 and 2003-2004. Petitioners raised a number of defenses, including: (1) that on the evidence before the agency, they were producers of raisins, not "handlers" subject to the Order; (2) that they did not "acquire" raisins within the meaning of the Order; (3) that, as producers, they had acted in good faith in furtherance of the Farmer-to-Consumer Direct Marketing Act of 1976, 7 U.S.C. §§ 3001-3007, and thus were exempt from the Order; and (4) that requiring the transfer of title to a portion of their annual raisin crop constituted an unconstitutional taking of private property without just compensation under the Fifth Amendment. J.A. 72–79, 134–157, 170–181.

USDA rejected petitioners' defenses and concluded they had violated certain provisions of the Order by failing to set aside reserve raisins in 2002-2003 and 2003-2004. J.A. 96 (citing 7 C.F.R. §§ 989.66, 989.166). A USDA administrative law judge ("ALJ") held categorically that petitioners "no longer have a property right [in raisins they grew] that permits them to market their crop free of regulatory control." J.A. 39. And, while nominally disclaiming authority to address the constitutional defense, the USDA judicial officer reviewing the ALJ's decision held that it would "treat the Raisin Order as constitutional, as I believe it to be." J.A. 73.

USDA ordered petitioners to pay the dollar equivalent of the two years' reserve raisin contributions

($438,843) pursuant to 7 C.F.R. § 989.166(c), which requires a handler to "compensate the [RAC] for the amount of the loss resulting from [a] failure to so deliver" reserve raisins. And USDA assessed petitioners $202,600 in civil penalties under 7 U.S.C. § 608c(14)(B) for violations of the reserve-pool requirements.

Petitioners re-asserted the arguments identified above in seeking review of the Secretary's order pursuant to the AMAA's judicial review provision, 7 U.S.C. § 608c(15)(B), and in addition argued that a 2001 advisory letter from the USDA had informed petitioners that they would not be considered "handlers" subject to the Order under relevant circumstances. J.A. 140–144.

In granting the USDA summary judgment, the district court held that "transfer of title to the reserve tonnage does not constitute a *physical* taking," because "[t]he government does not physically invade [petitioners'] land to take the raisins" and "[t]he reserve tonnage remains in the possession of the handlers," even though the law effected a complete "transfer of title" from petitioners to the RAC. J.A. 178, 180.

Although it affirmed the grant of summary judgment, the Ninth Circuit held that it lacked jurisdiction to reach petitioners' Takings Clause defense. Relying on *Williamson County Regional Planning Commission* v. *Hamilton Bank of Johnson City*, 473 U.S. 172 (1985), for the proposition that the Takings Clause requires only "an adequate process for obtaining compensation," the court observed that the Tucker Act authorizes parties seeking compensation from

the United States to bring suit in the Court of Federal Claims. J.A. 303–304. The court concluded that petitioners' takings defense "must be brought [in the Court of Federal Claims] in the first instance." J.A. 304. This was so notwithstanding that petitioners did not seek *compensation*, but rather invoked the Takings Clause as a defense to enforcement, and any such action would merely involve reimbursement of the money the USDA ordered petitioners to pay.

SUMMARY OF ARGUMENT

The plurality opinion in *Eastern Enterprises* v. *Apfel*, 524 U.S. 498 (1998), should provide the controlling rule of decision in this case. Where the government requires a direct transfer of funds, and where a party seeks equitable relief in resisting application of that statute in an enforcement action, that party need not seek "compensation" in a duplicative second lawsuit under the Tucker Act.

The *Apfel* plurality's rationale is consistent with this Court's longstanding rule that a party may challenge the imposition of an unconstitutional fine when it is imposed, including in the context of the Takings Clause. The Ninth Circuit's contrary rule finds no basis in this Court's ripeness doctrine, as the Takings Clause defense in this case was unquestionably fit for judicial decision, and delaying its adjudication until a second lawsuit in the Court of Federal Claims would cause significant hardship. The Ninth Circuit's convoluted approach to adjudicating a Takings Clause defense unnecessarily duplicates proceedings, disserving litigants and judicial economy.

Bifurcating a Takings Clause defense into a second, subsequent lawsuit significantly burdens Fifth Amendment rights. The administrative agency and court involved in the initial enforcement proceedings may interpret the statute without considering Takings Clause issues, frustrating the goal of constitutional avoidance. Severing the Takings Clause issue prevents the agency and court from exercising discretion and applying their expertise. Litigants seeking to advance Takings Clause arguments in the Court of Federal Claims will incur needless time, expense, and uncertainty, and may face preclusion barriers based on factual or legal findings from the initial proceedings.

Finally, the Ninth Circuit's rule will adversely affect property rights nationwide, given the broad variety of contexts in which the government may impose cash fines or penalties on regulated parties. The burden on property rights is illustrated in this very case, given the significant constitutional concerns raised by the Raisin Marketing Order's physical appropriation of a substantial portion of each year's raisin crop.

ARGUMENT

As petitioners persuasively explain, the Court of Appeals erred in holding that a party may not raise the Takings Clause as a defense to a direct transfer of funds mandated by the federal government, but must instead pay the money and bring a duplicative second lawsuit seeking reimbursement in the Court of Federal Claims. This brief supplements that analysis by

presenting three additional arguments supporting that conclusion.

First, this Court can resolve this case by adopting the plurality's rule in *Eastern Enterprises* v. *Apfel*, 524 U.S. 498, 521 (1998): where the government "requires a direct transfer of funds," those "threatened with a taking [may] seek a declaration of the constitutionality of the disputed governmental action" in defending against its enforcement. *Apfel* is an exception to the rule of *Ruckelshaus* v. *Monsanto Co.*, 467 U.S. 986, 1016 (1984), that "[e]quitable relief is not available to enjoin an alleged taking of private property for a public use * * * when a suit for compensation can be brought against the [federal government] subsequent to the taking," which applies to actions "burdening real or physical property," as distinct from the obligation to pay money. *Apfel*, 524 U.S. at 520–521 (plurality opinion).[2]

Second, in addition to the doctrinal and practical reasons identified in *Apfel*, the Ninth Circuit's rule should be rejected because it would substantially burden Fifth Amendment rights—not only in terms of the cost and delay of bringing a second lawsuit, but also by undermining the likelihood of success on a takings defense by requiring piecemeal and repetitive

---

[2] Although *Monsanto* involved claims against the federal government, the Ninth Circuit cited *Williamson County*, which adopted a related "ripeness" rule that applies to takings claims against States. See 473 U.S. at 195 ("if a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and been denied just compensation").

litigation, which is disfavored throughout American law.

Finally, the Ninth Circuit's rule will burden property rights in a broad array of contexts, including (but by no means limited to) the agricultural marketing orders at issue here.

I. When The Government Directs The Payment Of Money In An Enforcement Action, A Party Can Raise The Takings Clause As A Defense

The Takings Clause of the Fifth Amendment provides that private property shall not "be taken for public use, without just compensation." U.S. Const. amend. V. Where government action burdens real or physical property, and where the government has made available a reasonable, certain and adequate mechanism for compensation, a party generally may not seek to enjoin the government action. See *Monsanto*, 467 U.S. at 1016; *Williamson County*, 473 U.S. at 194. This general rule, however, does not apply where a party seeks only *equitable* relief in resisting a government-directed transfer of funds. In such cases, deferring a Takings Clause defense to a separate suit for compensation "would entail an utterly pointless set of activities," because every dollar paid in the original proceeding would potentially "generate a dollar of * * * compensation." *Apfel*, 524 U.S. at 521 (plurality opinion).

A. The Plurality Opinion In *Apfel* Provides A Sufficient Rule Of Decision For This Case

In *Apfel*, this Court assessed the constitutionality of a federal statute requiring a private company, Eastern Enterprises, to contribute money to fund health care benefits for certain coal industry retirees. 524 U.S. at 514 (plurality opinion); *id.* at 550 (Kennedy, J., concurring in the judgment and dissenting in part). Eastern sought a declaratory judgment against enforcement of the provision, on grounds that it violated the Fifth Amendment. *Id.* at 517. Justice O'Connor, writing for a plurality of four Justices, concluded that the statute violated the Takings Clause and could be enjoined as applied to Eastern.

The plurality first addressed the threshold jurisdictional question of whether Eastern had properly asserted a claim for equitable relief in federal district court, rather than as one for compensation under the Tucker Act in the Court of Federal Claims. 524 U.S. at 519. The plurality acknowledged that the Court of Federal Claims has exclusive jurisdiction to render judgment on any claim against the United States "for money damages" in excess of $10,000 founded on the Constitution, and that "a claim for just compensation under the Takings Clause" must be brought in the Court of Federal Claims in the first instance, unless Congress has "withdrawn the Tucker Act" jurisdiction in the relevant statute. *Id.* at 520 (citing *Monsanto*, 467 U.S. at 1016–1019).

But, the plurality concluded, the requirement to proceed under the Tucker Act does not apply where a party "does not seek compensation from the Government," but rather "requests a declaratory judgment

that the [statute] violates the Constitution and a corresponding injunction against * * * enforcement." 524 U.S. at 520. Moreover, where the challenged statute, "rather than burdening real or physical property, requires a direct transfer of funds mandated by the Government," "it cannot be said that monetary relief against the Government is an available remedy [under the Tucker Act]." *Id.* at 521. In the plurality's view, "Congress could not have contemplated that the Treasury would compensate [Eastern] for [its] liability under the Act, for '[e]very dollar paid pursuant to a statute would be presumed to generate a dollar of Tucker Act compensation.'" *Ibid.* (quoting *In re Chateaugay Corp.*, 53 F.3d 478, 493 (2d Cir. 1995)); accord *Student Loan Mktg. Ass'n* v. *Riley*, 104 F.3d 397, 402 (D.C. Cir. 1997) ("[I]n cases involving straightforward mandates of cash payment to the government, courts may reasonably infer either that Tucker Act jurisdiction has been withdrawn or at least that any continued availability does not wipe out equitable jurisdiction."). Requiring a party to pay a fine or penalty and then seek "compensation" of the same amount in a second lawsuit under the Tucker Act "would entail an utterly pointless set of activities." *Apfel*, 524 U.S. at 521 (plurality opinion).

This conclusion was consistent, the plurality observed, with numerous prior decisions of this Court adjudicating the merits of claims for "equitable relief for Takings Clause violations" in related circumstances, without regard to the question of Tucker Act jurisdiction. 524 U.S. at 521–522 (citing *Babbitt* v. *Youpee*, 519 U.S. 234, 243–245 (1997), *Hodel* v. *Irving*, 481 U.S. 704, 716–718 (1987), *Concrete Pipe &*

Prods. of Cal., Inc. v. *Constr. Laborers Pension Trust for S. Cal.*, 508 U.S. 602, 641–647 (1993), and *Connolly* v. *Pension Benefit Guar. Corp.*, 475 U.S. 211, 221–228 (1986)).

The *Apfel* plurality's rationale and conclusion are instructive here. Petitioners "d[o] not seek compensation from the Government," but rather raised the Takings Clause as a defense to a USDA enforcement action that would "requir[e] a direct transfer of funds mandated by the Government." 524 U.S. at 520–521 (internal quotation marks omitted); accord *Duke Power Co.* v. *Carolina Envtl. Study Grp., Inc.*, 438 U.S. 59, 71 n.15 (1978) (concluding that the district court had jurisdiction where a property owner sought a "declaratory judgment that since the [challenged statute] does not provide advance assurance of adequate compensation in the event of a taking, it is unconstitutional").

As in *Apfel*, it is doubtful that the "equitable relief" petitioners seek is within the jurisdiction of the Court of Federal Claims under the Tucker Act. 524 U.S. at 520 (plurality opinion); *Bowen* v. *Massachusetts*, 487 U.S. 879, 905 (1988) ("[T]he Court of Claims has no power to grant equitable relief."); *Doe* v. *United States*, 372 F.3d 1308, 1313 (Fed. Cir. 2004). Moreover, the court of appeals' decision "'would entail an utterly pointless set of activities,'" *Apfel*, 524 U.S. at 521 (quoting *Riley*, 104 F.3d at 401)—requiring petitioners to raise all their defenses *except* the Takings Clause in the USDA enforcement proceeding (with subsequent review in federal district court), pay the resulting fines and penalties, and then seek compensation under the Takings Clause in a duplicative law-

suit in a second—and distant—forum. Here, as in *Apfel*, a suit under the Tucker Act would reduce to a claim for "compensation" for "[e]very dollar paid pursuant to [the USDA enforcement order]." *Ibid.*

That the payment obligation challenged in *Apfel* was to a private entity (a mine workers' benefits fund) rather than to the government itself only strengthens the rule's application in this case. If Congress "could not have contemplated that the Treasury would compensate coal operators * * * [because] [e]very dollar paid [to a miners' benefit fund] pursuant to a statute would be presumed to generate a dollar of Tucker Act compensation," 524 U.S. at 521 (plurality opinion) (internal quotation marks omitted), surely it could not have intended that every dollar petitioners paid to the Treasury *itself* would generate a reciprocal dollar of "compensation" from the Treasury in return.

This Court can reverse the Ninth Circuit's judgment by adopting the *Apfel* plurality's rationale to hold that where, as here, the government seeks to direct a transfer of funds through imposition of a fine or penalty, a party may raise the Takings Clause as a defense to enforcement. The *Apfel* plurality saw no necessary inconsistency between that position and *Monsanto*'s general rule favoring recourse to a suit for compensation under the Tucker Act, where "the challenged statute * * * burden[s] real or physical property" rather than requiring "a direct transfer of funds." 524 U.S. at 521; accord *In re Chateaugay Corp.*, 53 F.3d at 493 (recourse to Court of Federal Claims appropriate "where real or tangible property was physically invaded, regulated, or otherwise

burdened by legislative action"). The Ninth Circuit's contrary holding seeks to extend *Monsanto* beyond its proper scope.

B. The *Apfel* Plurality's Rationale Accords With The Longstanding Rule That A Party May Challenge The Imposition Of A Fine At The Time It Is Imposed

The Ninth Circuit did not attempt to address the broad historical or doctrinal foundation for the *Apfel* plurality's rationale. Several lines of authority support applying the plurality's common-sense approach in deciding the appropriate forum for raising a takings defense in the context of this case.

1. A Property Owner Subject To An Unconstitutional Taking Of Property May Challenge An Enforcement Fine When It Is Imposed

This Court has long held that a party resisting an unconstitutional taking of private property may challenge a monetary enforcement fine at the time it is imposed. In *Missouri Pacific Railway Co.* v. *Nebraska*, 217 U.S. 196 (1910), this Court struck down a Nebraska statute that purported to require railroads to construct a side track to accommodate grain elevators adjacent to the railroad's right of way. Under the statute, Missouri Pacific faced statutory "fine[s]" for declining to construct a side-track upon request by a grain elevator company. *Id.* at 204. Justice Holmes, writing for the Court, upheld the railroad's Takings Clause defense to enforcement of the law and imposition of penalties, concluding that the statute was unconstitutional "because it does not provide indemnity for what it requires" of railroads. *Id.* at 208.

In so doing, the Court specifically rejected the proposition that "the owner of the property [must] ac[t] at its risk, not merely of being compelled to pay both the expense of building [the side-track] and the costs of suit, but also of incurring a fine * * * for its offense in awaiting the result of a hearing" to determine whether the railroad had justifiably refused to comply with a particular request. 217 U.S. at 208.[3] The Court's analysis bears on the circumstances of this case, as the Ninth Circuit's rule would require petitioners to "incu[r] a fine" while "awaiting the result of a hearing" to adjudicate their Takings Clause challenge to the Raisin Marketing Order.

Missouri Pacific accords with this Court's more general concern that judicial review not be chilled by penalties imposed for noncompliance with a law whose validity is challenged. Thus, this Court has expressed discomfort that "[l]iability to a penalty for violation of [an] orde[r], before [its] validity has been determined, would put the party affected in a position where he himself must at his own risk pass upon the question. He must either obey what may finally be

---

[3] The Court had earlier explained one basis for a railroad to refuse to comply: in the Court's view, "circumstances must be exceptional when it would be constitutional to throw the extra charge of reduplicating already physically adequate accommodations upon the [rail]road." 217 U.S. at 207. Nor could the Nebraska statute be saved by an interpretation requiring compliance only with "reasonable" demands, because the statute made no provision for "a hearing in advance to decide whether the demand is [reasonable]." *Id.* at 207–208. The Court rejected the idea that a railroad could be subject to penalties for refusing to comply with what it perceived to be an unreasonable request. *Id.* at 208.

held to be a void order, or disobey what may ultimately be held to be a lawful order." *Wadley S. Ry. Co.* v. *Georgia*, 235 U.S. 651, 662–663 (1915). This principle finds its modern foundation in the constitutional tolling doctrine, which requires tolling of a penalty or fine where a statute of uncertain validity carries a sanction that would deter challenges. *Ex parte Young*, 209 U.S. 123 (1908); *United States* v. *Louisiana-Pacific Corp.*, 967 F.2d 1372, 1378 (9th Cir. 1992) (discussing doctrine). And this Court recently rejected an interpretation of a federal statute that would "enable the strong-arming of regulated parties into 'voluntary compliance' without the opportunity for judicial review." *Sackett* v. *EPA*, 132 S. Ct. 1367, 1374 (2012).

The Ninth Circuit did not acknowledge that the $700,000 in fines and penalties imposed on petitioners would likely deter both petitioners and other raisin producers from challenging the Raisin Marketing Order's validity. Small, independent raisin producers—like many small businesses nationwide in a variety of fields— frequently are of modest means, and lack the substantial financial resources it would take to pay significant fines and penalties and also to underwrite litigation in two courts. Under the circumstances, acquiescence in an unconstitutional regulation may be the only realistic option when the alternative is incurring fines and penalties in the hope of prevailing in a costly, time-consuming, and uncertain second lawsuit under the Tucker Act.

2. Treating Petitioners' Defense As "Premature" Has No Basis In This Court's Ripeness Doctrine

The Ninth Circuit's conclusion that petitioners' Takings Clause challenge to an administrative order imposing nearly $700,000 in fines and penalties was "premature" (J.A. 306) cannot be reconciled with this Court's modern ripeness doctrine. That doctrine seeks to ensure that claims are adjudicated when they are "fi[t] * * * for judicial decision," and when delaying review would cause hardship for the challenging party. *Abbott Labs.* v. *Gardner*, 387 U.S. 136, 149 (1967); *Pac. Gas & Elec. Co.* v. *State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 201 (1983). Petitioners' Takings Clause defense was plainly ripe under that standard. See, *e.g.*, Timothy V. Kassouni, *The Ripeness Doctrine and the Judicial Relegation of Constitutionally Protected Property Rights*, 29 Cal. W. L. Rev. 1, 3 (1992) (discussing application of ripeness doctrine to property rights claims).

Petitioners' Takings Clause defense was "fi[t] * * * for judicial decision" in the district court. *Abbott Labs.*, 387 U.S. at 149. Petitioners contend that the Raisin Marketing Order's reserve requirements for 2002-2003 and 2003-2004 constituted a per se physical taking of private property in violation of the Fifth Amendment, in the context of an enforcement action seeking to impose a specific set of fines and penalties for noncompliance with that Order. That argument is not an "abstract disagreemen[t] over administrative policies" (*id.* at 148), but rather a real dispute situated in a "concrete fact situation" that will guide a court's adjudication, *Cal. Bankers Ass'n* v. *Shultz*,

416 U.S. 21, 56 (1974). The Secretary's order imposing fines and penalties on petitioners unquestionably constitutes "final agency action." *Abbott Labs.*, 387 U.S. at 149; 7 U.S.C. § 608c(14)(B) (Secretary's order assessing a penalty for violation of reserve pool requirements "shall be treated as a final order reviewable in the district courts of the United States"); accord *Sackett*, 132 S. Ct. at 1372. In short, "[n]o future uncertainty exists as to the imposition of the penalty." *Traficanti* v. *United States*, 227 F.3d 170, 176 n.2 (4th Cir. 2000).

Delaying review of the Takings Clause defense until a second lawsuit in the Court of Federal Claims would cause significant hardship for petitioners. Even in the context of *pre-enforcement* review, where a party seeks to invoke the authority of the courts before it has been subject to enforcement action, an issue is "appropriate for judicial review" where a party would face a choice between unnecessary compliance and suffering the "risk [of] serious * * * civil penalties" for actions "believe[d] in good faith" to be lawful. *Abbott Labs.*, 387 U.S. at 152–153. The USDA's order "requires [petitioners] to make significant changes in their everyday business practices," and "if they fail to observe the [Secretary's] [order] they are quite clearly exposed to the imposition of strong sanctions." *Id.* at 154; accord Erwin Chemerinsky, *Constitutional Law* 107 (3d ed. 2006) (surveying cases finding pre-enforcement claims ripe where a party "is forced to choose between forgoing possibly lawful activity and risking substantial sanctions").

Where, as here, the government has chosen to seek only cash fines and penalties, possible concerns

about "delay[ing] or imped[ing] effective enforcement" (*Abbott Labs.*, 387 U.S. at 154) by permitting challenges to go forward are greatly reduced. The Government initiated this suit to seek the specific remedy of "compensat[ion] * * * for the amount of the loss resulting from [petitioners'] failure to so deliver" raisins. 7 C.F.R. § 989.166(c). This suit is not one in which the government seeks "a mandatory injunction commanding compliance" with an order. Cf. *United States* v. *Ruzicka*, 329 U.S. 287, 289 (1946). Adjudicating petitioners' Takings Clause argument among the numerous other defenses it asserted in the enforcement action would have no material effect on the efficacy of enforcement. And to the extent petitioners' Takings Clause defense is "equitable in nature, * * * other equitable defenses may be interposed" if (unlike here) claims were raised "to delay enforcement." *Abbott Labs.*, 387 U.S. at 155 (relief may be denied if, *e.g.*, the "Government is prejudiced by a delay").

This case, therefore, does not implicate the concern identified in *Ruzicka*, where this Court held that a handler could not raise challenges to the terms of a milk marketing order as an affirmative defense in an enforcement action seeking a "mandatory injunction commanding compliance." 329 U.S. at 289. The Court's holding there was predicated on the view that handlers are "assured [the] opportunity to establish claims of grievances" through the administrative review procedure in 7 U.S.C. § 608c(15). 329 U.S. at 292. Where a Government enforcement action seeks cash fines and penalties, however, litigating affirmative defenses in the enforcement action would not be "disruptive," or threaten the "vitality of the whole

arrangement," as this Court feared in the context of a suit for a mandatory injunction in *Ruzicka*. *Id.* at 292–293. Indeed, petitioners sought to employ the administrative review procedure into which *Ruzicka* channeled claims.

3. The Ninth Circuit's Rule Undermines The General Presumption In Favor Of Resolving Claims In A Single Proceeding

Requiring a property owner subject to an enforcement action to litigate all defenses *except* the Takings Clause and then bring a separate, duplicative lawsuit runs contrary to a general presumption, pervasive in American law, in favor of resolving related claims in a single proceeding. This presumption is embodied in several distinct lines of authority.

Under the doctrine of claim preclusion, for instance, "a final judgment on the merits of an action precludes * * * relitigating issues that were or could have been raised in that action." *San Remo Hotel, L.P.* v. *City & Cnty. of S.F.*, 545 U.S. 323, 336 n.16 (2005) (quoting *Allen* v. *McCurry*, 449 U.S. 90, 94 (1980)). The doctrine "promotes predictability in the judicial process, preserves the limited resources of the judiciary, and protects litigants from the expense and disruption" of repeated litigation. *Palka* v. *City of Chi.*, 662 F.3d 428, 437 (7th Cir. 2011); see also *ibid.* (res judicata "is meant to prevent" "claim splitting in duplicative lawsuits").

Similar principles are reflected in the related but distinct prohibition on duplicative litigation. See *Colo. River Water Conservation Dist.* v. *United States*, 424 U.S. 800, 817 (1976) ("As between federal district

courts, * * * the general principle is to avoid duplicative litigation."). A court's authority to dismiss, enjoin, or consolidate a duplicative lawsuit serves judicial economy and the "comprehensive disposition of litigation." *Kerotest Mfg. Co.* v. *C-O-Two Fire Equip. Co.*, 342 U.S. 180, 183–184 (1952); see also *Curtis* v. *Citibank, N.A.*, 226 F.3d 133 138–139 (2d Cir. 2000).

Federal courts routinely exercise supplemental jurisdiction over state-law claims to further "considerations of judicial economy, convenience and fairness to litigants." *United Mine Workers of Am.* v. *Gibbs*, 383 U.S. 715, 726 (1966). In this manner, courts avoid "[d]uplicative and piecemeal litigation, and the resulting potential for inconsistent * * * decrees." *Fern* v. *Turman*, 736 F.2d 1367, 1370 (9th Cir. 1984). This justification extends where "discovery conducted on the federal issues might aid a gathering of facts relevant to local-law issues," such that "a single proceeding [will] enable a just disposition of the entire controversy." *Prakash* v. *Am. Univ.*, 727 F.2d 1174, 1183 (D.C. Cir. 1984).

Similar principles redound in diverse areas of American law. See, *e.g.*, Fed. R. Civ. P. 42(a) (authorizing consolidation of multiple actions that involve "common question[s] of law or fact"); *Nova Prods., Inc.* v. *Kisma Video, Inc.*, 220 F.R.D. 238, 240 (S.D.N.Y. 2004) ("The underlying principle behind impleader [under Federal Rule of Civil Procedure 14] is to promote judicial efficiency by permitting the adjudication of several claims in a single action, and thus eliminate circuitous, duplicative actions." (internal quotation marks omitted)); *Mohawk Indus., Inc.* v. *Carpenter*, 130 S. Ct. 599, 605 (2009) ("final-

judgment rule" furthers "efficient judicial administration" by avoiding "piecemeal" appeals); *Brillhart* v. *Excess Ins. Co. of Am.*, 316 U.S. 491, 495 (1942) (abstention appropriate where it is "uneconomical as well as vexatious for a federal court to proceed in a declaratory judgment suit" in light of parallel suit in state court "presenting the same issues * * * between the same parties").

II. Requiring Petitioners To Pay the Fine and Pursue A Duplicative Second Lawsuit Would Substantially Burden Fifth Amendment Rights

The Ninth Circuit's jurisdictional rule would, as a practical matter, significantly burden Fifth Amendment property rights, by denying a "reasonable, certain and adequate" means of addressing a challenge to the government's conduct. Cf. *Preseault* v. *Interstate Commerce Comm'n*, 494 U.S. 1, 11 (1990) (government must provide a "reasonable, certain and adequate provision for obtaining compensation").

A. Constitutional Avoidance

The Ninth Circuit's bifurcation of cases involving Takings Clause defenses is inconsistent with fundamental principles of constitutional avoidance. See, *e.g.*, *Edward J. DeBartolo Corp.* v. *Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988) ("where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress").

This Court has recognized the need, in appropriate circumstances, to "adop[t] a narrowing construction of a statute to avoid a taking difficulty." *United States* v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121, 128 n.5 (1985) (discussing *United States* v. *Sec. Indus. Bank*, 459 U.S. 70 (1982), which adopted a narrowing construction because "there [was] an identifiable class of cases in which application of a [provision of the Bankruptcy Code] will necessarily constitute a taking").

Because the Ninth Circuit's rule shunts consideration of Takings Clause arguments for later proceedings in the Court of Federal Claims, the agency and court in the enforcement proceedings may interpret the statute without briefing on (or even awareness of) the potential Takings Clause concern, but in a manner that implicates the Clause. In a subsequent lawsuit, the Court of Federal Claims may be precluded from adopting a contrary or narrower interpretation that would avoid the constitutional concern. In other contexts, this Court has noted the desirability of having constitutional claims raised at the same time as statutory and regulatory claims to give relevant decisionmakers the opportunity to avoid constitutional concerns. *Aircraft & Diesel Equip. Corp.* v. *Hirsch*, 331 U.S. 752, 772 (1947); accord *Pub. Utils. Comm'n of Cal.* v. *United States*, 355 U.S. 534, 539–540 (1958).

B. Administrative Exhaustion

The Ninth Circuit's rule also turns the doctrine of exhaustion of administrative remedies on its head, leading to inefficiency and increasing the risk of error

in the adjudication of claims. Requiring a party to present its arguments in the first instance to the responsible agency ensures that the agency can "develop the necessary factual background" and can "exercise [its] discretion" and "apply [its] expertise" to the problem at hand. *McKart* v. *United States*, 395 U.S. 185, 193–194 (1969). "[J]udicial review may be hindered by the failure * * * to allow the agency" to exercise these functions. *Id.* at 194. Exhaustion also serves judicial efficiency, because a party that vindicates its rights before the agency may not need to resort to the courts. *Id.* at 195; accord *Woodford* v. *Ngo*, 548 U.S. 81, 88–89 (2006).

The Ninth Circuit's rule undermines each of these important goals. Here, USDA instituted administrative proceedings that developed an extensive factual record for decision and judicial review. J.A. 54–64. The agency acquired familiarity with the facts and applied its expertise in administering the Raisin Marketing Order. For instance, the agency interpreted and applied the terms "acquires" and "handler" from the Order in adjudicating petitioners' various claims and defenses. J.A. 74–79. Yet, the Ninth Circuit would sever the Takings Clause argument from the administrative proceeding and present it, long after the agency proceedings have concluded, in a different forum with no prior familiarity with the case, the facts, or the regulatory scheme.

C. Time and Expense Of Vindicating Rights

The Ninth Circuit's convoluted procedure also imposes significant expense, difficulty, and delay on property owners' attempts to vindicate Fifth Amend-

ment rights. As other *amici* have explained, advancing a takings claim in the Court of Federal Claims can require years of litigation and substantial attorneys' fees. See Br. for the Cato Institute et al. as *Amici Curiae* in Support of the Petition for Certiorari 19–20. Small businesses and other property owners may face practical and logistical difficulties—and even bankruptcy—where, as here, they must bear the costs of duplicative litigation, in addition to substantial fines and penalties, in the uncertain hope of eventual compensation from the Court of Federal Claims. *Id.* at 21–22; *Sackett*, 132 S. Ct. at 1374. Especially for small businesses, the prospect of shouldering double legal fees plus "heavy penalties for violation of commands of [even] disputable and uncertain legality" may "inevitably" lead them to "yield to [unconstitutional] orders, rather than risk the enormous cumulative or confiscatory punishment that might be imposed if they should thereafter be declared to be valid." *Wadley S. Ry. Co.*, 235 U.S. at 662–663.

For these and other reasons, this Court has rejected a reading of its Takings Clause cases that would "requir[e] property owners to 'resort to piecemeal litigation or otherwise unfair procedures.'" *San Remo*, 545 U.S. at 346 (quoting *MacDonald, Sommer & Frates* v. *Yolo Cnty.*, 477 U.S. 340, 350 n.7 (1986)). This case presents no basis to depart from that well-settled principle, as the Ninth Circuit's rule would make it harder and less likely for small businesses and other property owners to vindicate their constitutional rights.

D. Preclusion

Requiring petitioners to litigate all their *other* defenses in the underlying enforcement case (which may overlap factually and legally with their Takings Clause defense) and then seek reimbursement in a second lawsuit in the Court of Federal Claims may also create preclusion barriers to the success of a takings argument.

Here, for instance, petitioners resisted the imposition of penalties by citing a 2001 advisory letter from the USDA stating that they would not be considered "handlers" subject to the Order under certain factual circumstances. J.A. 140. The district court analyzed the letter and made factual findings about whether petitioners could have reasonably relied on the letter to understand that they were not subject to the Raisin Marketing Order. See J.A. 142 (surveying "evidence [that] supports" the conclusion that petitioners performed activities that would subject them to regulation as a "handler"). USDA and the district court found that the Farmer-to-Consumer Act did not support an understanding that petitioners were exempt from regulation as "handlers" under the Order. And the Ninth Circuit and district court made findings about whether petitioners made deliberate efforts to "avoid the Raisin Marketing Order's requirements" (J.A. 298) and their "culpability" in not setting aside raisins (J.A. 168).

In a subsequent Tucker Act lawsuit, the government could invoke these factual findings to argue, for instance, that the Raisin Marketing Order did not interfere with any reasonable "investment-backed expectations" for property rights in raisins because pe-

titioners lacked a basis to believe they were not "handlers." Cf. *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982).

Concerns about preclusion in the Court of Federal Claims are hardly hypothetical. In *Paradissiotis* v. *United States*, 49 Fed. Cl. 16 (2001), aff'd, 304 F.3d 1271 (Fed. Cir. 2002), the plaintiff challenged, in federal district court, an order freezing his personal assets. The district court concluded he could not state a viable cause of action for a taking, but the Fifth Circuit vacated that judgment, concluding that the Court of Federal Claims had exclusive jurisdiction over the takings claim. The Court of Federal Claims acknowledged that "the [vacated] portions" of the district court's decision were not preclusive, but cautioned that "the District Court and the Fifth Circuit made findings on factual issues that were necessary to the disposition of the other claims, and some of these findings of fact are pertinent to the analysis of the takings issue in this case." *Id.* at 19 n.2. The Court of Federal Claims "w[ould] not revisit such findings," and so in litigating his takings claim, the plaintiff would be limited to "other [pertinent] facts not involved in the previous proceedings"—if any. *Ibid.*

Similarly, in *Klump* v. *United States*, 38 Fed. Cl. 243 (1997), a cattle owner alleged that the impoundment of his cattle for unauthorized grazing on federal lands was an unconstitutional taking. He initially sought administrative relief at the Department of the Interior. The Court of Federal Claims later held that the plaintiff was bound by administrative determinations of facts—such as whether the government's ac-

tions were taken pursuant to and consistent with applicable regulations. *Id.* at 247.

San Remo does not render preclusion principles irrelevant here. There, this Court held that federal courts may not craft a judicial exception to the Full Faith and Credit Statute, 28 U.S.C. § 1738, to allow a federal court to adjudicate a takings claim when a party has been forced to pursue compensation in state court. 545 U.S. at 326. The Court's holding was based in part on the lack of a textual basis for an exception to Section 1738. *Id.* at 344–345. The Court also observed that the property owners had voluntarily presented their federal takings claim in state court, instead of carefully "reserv[ing] [the] right" to adjudicate it in federal court. *Id.* at 339–341. Nothing in that analysis controls whether the Court should endorse the Ninth Circuit's duplicative and wasteful two-part procedure. Petitioners do not seek two bites at the apple of their takings defense, but rather seek to assert it in the most relevant and appropriate forum: the USDA enforcement action followed by review in district court. And the Ninth Circuit's rule runs afoul of this Court's specific admonition in *San Remo* against "interpret[ing] [its] cases as requiring property owners to 'resort to piecemeal litigation or otherwise unfair procedures.'" *Id.* at 346 (quoting *Yolo Cnty.*, 477 U.S. at 350 n.7).

III. The Ninth Circuit's Rule Would Adversely Affect Property Rights In A Wide Range of Circumstances

A. Property Owners Face Government-Directed "Transfer[s] of Funds" In A Variety of Contexts

Although this case arises in the specific statutory context of the AMAA and the Raisin Marketing Order, the Ninth Circuit's jurisdictional rule could have broad consequences for parties seeking to challenge unconstitutional monetary fines and penalties, given the "nearly infinite variety of ways in which government actions or regulations can affect property interests." *Ark. Game & Fish Comm'n* v. *United States*, 133 S. Ct. 511, 518 (2012). The federal government has sought to "requir[e] a direct transfer of funds," *Apfel*, 524 U.S. at 521 (plurality opinion), in a range of circumstances that affect business interests in various sectors of the economy. Takings arguments are frequently interposed in such circumstances; the mandatory bifurcation of the cases only serves to multiply proceedings and delay the ultimate resolution of disputes.

To take just a few examples, the Black Lung Benefits Act, 30 U.S.C. §§ 901–944, requires coal operators to pay money to reimburse the federal government for certain health care costs of mine workers and eligible survivors. Although in 1977 Congress amended the act to provide for automatic benefits for a miner's eligible survivor (i.e., without the need to prove that the miner's death was caused by black lung disease), Congress tightened eligibility require-

ments in 1981, effectively eliminating automatic survivors' benefits. See *W. Va. CWP Fund* v. *Stacy*, 671 F.3d 378, 381 (4th Cir. 2011).

However, in 2010, Congress retroactively revived automatic survivors' benefits by removing the limiting language added to the statute in 1981. See *W. Va. CWP Fund*, 671 F.3d at 381–382. As a result, the survivor of a deceased miner who was denied benefits under the (post-1981) tightened standards for failing to prove that pneumoconiosis caused the miner's death might later be deemed entitled to full benefits retroactively. See *id.* at 382. Under the Ninth Circuit's rule, a coal operator facing direct financial liability to the Government for these retroactive benefits would be forced to litigate any other defenses to the order in the initial proceedings, perhaps including a due process challenge closely related to a takings argument. See *Apfel*, 524 U.S. at 550 (Kennedy, J., concurring in the judgment and dissenting in part). The coal operator would then be required to pay the government the amounts in question, and file a second lawsuit in the Court of Federal Claims for reimbursement of those funds. Other federal courts have not adopted that burdensome approach. See *W. Va. CWP Fund*, 671 F.3d at 386–388 (reaching merits of coal operator's Takings Clause claim arising in petition for review of decision of Department of Labor Benefits Review Board).

The Fair and Equitable Tobacco Reform Act of 2004, 7 U.S.C. § 518 *et seq.* ("FETRA"), imposes annual monetary assessments on tobacco manufacturers and importers to finance a buyback program to support tobacco growers upon termination of govern-

ment quotas and price supports. See 7 U.S.C. § 518d; 7 C.F.R. §§ 1463.3, 1463.4. Assessments are calculated based on the manufacturer or importer's share of the gross domestic volume of tobacco products sold. 7 U.S.C. § 518d(e)(1), (2). The law's effect on tobacco manufacturers can be significant: one manufacturer who purchased less than 1% of its tobacco in the United States between 1999-2004 faced annual assessments of $11 million a year, and more than $100 million over a ten-year period. See *Swisher Int'l, Inc.* v. *Schafer*, 550 F.3d 1046, 1049–1050 (11th Cir. 2008).

Under the Ninth Circuit's holding, a tobacco manufacturer seeking to challenge the annual assessments as an unconstitutional taking must litigate all its other defenses in available administrative and judicial proceedings—and must pay any penalties associated with noncompliance—before filing a second lawsuit in the Court of Federal Claims seeking "reimbursement" for the same. The absence of cases adopting this approach suggests the unreasonableness of the rule. See, *e.g.*, *Swisher*, 550 F.3d at 1050–1057 (reaching merits of takings claim brought in federal district court to review FETRA assessments); accord *United States* v. *Native Wholesale Supply Co.*, 822 F. Supp. 2d 326 (W.D.N.Y. 2011) (similar).

A takings defense involving a "direct transfer of funds" (*Apfel*, 542 U.S. at 521) may also arise from the imposition of a penalty. In *Traficanti* v. *United States*, 227 F.3d 170 (4th Cir. 2000), the owner of a convenience store was penalized when an employee was found to have engaged in improper food stamp

transactions. The Agriculture Department issued a permanent bar from the food stamp program, and a $40,000 penalty payable if the owner ever attempted to sell his business. *Id.* at 173–174. The owner challenged the penalty as an unconstitutional taking. Although the district court treated the takings argument as unripe, the court of appeals addressed it on the merits, without suggesting that the owner was required to pay the penalty and then seek compensation. (Indeed, evidence showed that path was unavailable as a practical matter, because the owner's every "attempt[t] to sell his store * * * collapsed due to the looming transfer penalty," *id.* at 176 n.2.)

Similarly, in *Russo Development Corp.* v. *Thomas*, 735 F. Supp. 631 (D.N.J. 1989), a property developer sought declaratory and injunctive relief after EPA vetoed an after-the-fact Clean Water Act wetlands development permit authorized by the Corps of Engineers. The developer raised a takings claim, which the Government sought to dismiss on grounds of Tucker Act jurisdiction. The court rejected the Government's view, observing that the most likely relief "would be simply a lowering of the penalties and mitigation requirements for a permit rather than the payment of money damages." *Id.* at 636.

Finally, in *United States* v. *American Electric Power Service Corp.*, 218 F. Supp. 2d 931 (S.D. Ohio 2002), the government brought an enforcement action alleging that owners and operators of various electric power plants had violated the Clean Air Act. The defendants claimed that application of the provisions in question to their plants would violate the Takings Clause. They invoked *Apfel*, arguing that it would be

senseless to require them to pay penalties in the enforcement action and then seek compensation under the Tucker Act. The district court struck the Takings Clause defense, holding that the Tucker Act was available to provide compensation, including for any penalties that the defendants might be required to pay in the enforcement action.

B. The Raisin Marketing Order Raises Significant Constitutional Concerns

Petitioners assert that the Raisin Marketing Order constitutes a per se, physical taking of their personal property in violation of the Fifth Amendment. Although this Court need not reach the merits of that argument in resolving the questions presented, even a brief discussion illustrates that the Ninth Circuit's Rube Goldberg–esque procedural rule would apply to hinder the vindication of substantial constitutional claims.

In *Loretto*, this Court long ago established that "a permanent physical occupation [of property] authorized by government" is a per se taking "without regard to the public interests that it may serve." 458 U.S. at 426. Thus, "'[w]hen the government physically takes possession of an interest in property for some public purpose, it has a categorical duty to compensate the former owner.'" *Ark. Game & Fish Comm'n*, 133 S. Ct. at 518 (quoting *Tahoe-Sierra Pres. Council, Inc.* v. *Tahoe Reg'l Planning Agency*, 535 U.S. 302, 322 (2002)). Petitioners contend that by requiring physical segregation of a portion of their raisin crop each year "for the account" of a government agent—on pain of fines calculated as the cash equivalent of

the raisins themselves—the Order effects a "permanent physical occupation" of their property.

Petitioners have a property interest in the raisins they grow and produce—"the rights 'to possess, use and dispose of [the raisins]'"—that is protected by the Takings Clause. *Loretto*, 458 U.S. at 435 (quoting *United States* v. *Gen. Motors Corp.*, 323 U.S. 373, 378 (1945)); *Evans* v. *United States*, 74 Fed. Cl. 554, 563 (2006) ("under California law, plaintiffs unquestionably had title to their raisins grown in their fields"). And no less than in *Loretto*, a permanent physical occupation of this personal property by the government or its agent "effectively destroys each of [the above] rights." 458 U.S. at 432–433 n.9, 435.

Although this Court has not had occasion to address *Loretto*'s application to the agricultural marketing orders at issue here, there is substantial authority for the proposition that the per se rule is not limited to physical occupation of real property. See *Brown* v. *Legal Found. of Wash.*, 538 U.S. 216, 235 (2003) (applying per se analysis to a takings claim concerning interest earned on lawyers' trust accounts); *Connolly*, 475 U.S. at 225 (questioning whether government could "physically invade or permanently appropriate [a private party's] assets for its own use"); *Nixon* v. *United States*, 978 F.2d 1269, 1285 (D.C. Cir. 1992) ("the Government's inference that the per se doctrine must be limited to real property is without basis in the law").

As in *Loretto*, the Raisin Marketing Order deprives petitioners of each of the sticks in its bundle of rights—i.e., to possess, use, and dispose of the reserved raisins—by directing handlers to segregate

the raisins physically and hold them "for the account" of the RAC. Under the Order, handlers must dispose of the reserve raisins as directed by the RAC. See *Evans*, 74 Fed. Cl. at 558 ("the raisin marketing order grants to * * * the RAC[] the power to sell or dispose of all of the reserves" and "effects a direct transfer of title of a producer's 'reserve tonnage' raisins to the government") (citing 7 C.F.R. §§ 989.67(a), 989.54, 989.65, 989.66(b)(2)); *Yee* v. *City of Escondido*, 503 U.S. 519, 522 (1992) (per se taking occurs "[w]here the government authorizes a physical occupation of property (or actually takes title)").

That petitioners in fact "kept the raisins at issue" by declining to comply with the Order does not preclude a "physical occupation" defense. Cf. J.A. 243–244. USDA imposed a "compensat[ory]" fine on petitioners expressly calculated as the monetary equivalent of the reserve raisins, depriving petitioners of their property no less effectively than physical occupation. See 7 C.F.R. § 989.166(c). As this Court recently explained in surveying historical cases relevant to the per se doctrine, "takings claims * * * [are] not confined to instances in which the Government took outright physical possession of the property involved." *Ark. Game & Fish Comm'n*, 133 S. Ct. at 519. More generally, of course, the Government may not burden a constitutional right by imposing a penalty on its exercise. See, *e.g.*, *Wisconsin* v. *Yoder*, 406 U.S. 205 (1972) (imposition of $5 fine for failure to comply with a compulsory education law violates the First Amendment). There is "no reason why the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as the First Amendment or

Fourth Amendment, should be relegated to the status of a poor relation." *Dolan* v. *City of Tigard*, 512 U.S. 374, 392 (1994).

The reserve-pool requirement cannot be dismissed as "an in-kind tax or service fee on the sale of raisins by producers." Br. in Opp. 19 n.6; *Evans*, 74 Fed. Cl. at 563–564 ("In essence, Plaintiffs are paying an admissions fee or a toll—admittedly a steep one—for marketing raisins. The government does not force plaintiffs to grow raisins or to market the raisins; rather, it directs that if they grow and market raisins, then passing title to their 'reserve tonnage' raisins to the RAC is their admission ticket."). This dangerous theory has no basis in this Court's precedents, and would render all but meaningless the Fifth Amendment's core property rights guarantee. In *Loretto*, this Court cautioned specifically that "a landlord's ability to rent his property may not be conditioned on his forfeiting the right to compensation for a physical occupation." 458 U.S. at 439 n.17. A "fee or toll" theory essentially conditions petitioners' right to dispose of personal property upon forfeiting compensation for a physical appropriation of a portion of that property.[4] The Government's "toll or fee" theory admits of

---

[4] Nor can Petitioners retain their property rights by disposing of the raisins in the intrastate market. Compare *Wallace* v. *Hudson-Duncan & Co.*, 98 F.2d 985, 989 (9th Cir. 1938) (rejecting takings challenge to walnut marketing order because grower could "choos[e] not to comply with the interstate requirements of the Order, [and] nevertheless retain all its walnuts intrastate and dispose of them to intrastate buyers"), with *Wickard* v. *Filburn*, 317 U.S. 111, 125 (1942), and *Gonzales* v. *Raich*, 545 U.S. 1, 17 (2005) ("Our case law firmly establishes Congress' power to regulate purely local activities that are part of an economic

no principled limitation, and could be used to justify nearly any confiscatory regulation, from a requirement that owners of farmland pay an "in-kind" tax by turning over 50% of their acreage or other property rights,[5] to an "in-kind" tax on owners of beachfront property requiring them to surrender the first 10 yards of property above the mean high-tide line,[6] to one that takes physical possession of half the cars an auto manufacturer produces under the rubric of a 50 percent "in-kind fee" on automobile sales.

CONCLUSION

The Court should reverse the judgment below and remand for further proceedings.

'class of activities' that have a substantial effect on interstate commerce.").

[5] Cf. *United States* v. *Causby*, 328 U.S. 256 (1946) (government's use of chicken farmer's airspace for overflight is a taking).

[6] Cf. *Stop the Beach Renourishment, Inc.* v. *Fla. Dep't of Envtl. Prot.*, 130 S. Ct. 2592, 2598 (2010) (discussing property rights in beach located above high-water line).

Respectfully submitted.

ROBIN S. CONRAD
RACHEL L. BRAND
SHELDON GILBERT
NATIONAL CHAMBER
LITIGATION CENTER
1615 H Street, NW
Washington, DC 20063
(202) 463-5337

JOHN P. ELWOOD
Counsel of Record
JEREMY C. MARWELL
VINSON & ELKINS LLP
2200 Pennsylvania Ave., NW, Suite 500 West
Washington, DC 20037
(202) 639-6500
jelwood@velaw.com

J. ERIC PARDUE
VINSON & ELKINS LLP
1001 Fannin Street, Suite 2500
Houston, TX 77002
(713) 758-2222

Attorneys for Amicus Curiae
Chamber of Commerce of the United States of America

JANUARY 2013

AMICUS CURIAE BRIEF

Supreme Court, U.S.
FILED
JAN 16 2013
OFFICE OF THE CLERK

No. 12-123

IN THE
Supreme Court of the United States

MARVIN D. HORNE, ET AL.,
Petitioners,

v.

UNITED STATES DEPARTMENT OF AGRICULTURE,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF *AMICI CURIAE* CONSTITUTIONAL LAW SCHOLARS IN SUPPORT OF PETITIONERS

SCOTT A. KELLER
Counsel of Record
J. CAMPBELL BARKER
YETTER COLEMAN LLP
221 W. Sixth St., Suite 750
Austin, Texas 78701
(512) 533-0150
skeller@yettercoleman.com

Counsel for Amici Curiae Constitutional Law Scholars in Support of Petitioners

Library of Congress
Law Library

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

IDENTITY AND INTEREST OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 5

I. PETITIONERS' TAKINGS CLAUSE DEFENSE IS RIPE UNDER ARTICLE III, AND *WILLIAMSON COUNTY*'S LITIGATION "RIPENESS" REQUIREMENT IS MISTAKEN ... 5

II. THE DISTRICT COURT HAD JURISDICTION TO HEAR PETITIONERS' TAKINGS CLAUSE DEFENSE 16

CONCLUSION 27

TABLE OF AUTHORITIES

CASES **Page(s)**

Bigby v. *United States*,
188 U.S. 400 (1903) 20

Bragg v. *Weaver*,
251 U.S. 57 (1919) 9

Cherokee Nation v. *Southern Kan. Ry. Co.*,
135 U.S. 641 (1890) ..... passim

City of Chi. v. *Int'l Coll. of Surgeons*,
522 U.S. 156 (1997) 16

D.M. Osborne & Co. v. *Mo. Pac. R.R. Co.*,
147 U.S. 248 (1893) 8

Daniels v. *Williams*,
474 U.S. 327 (1986) 13

Director, Office of Workers' Comp. Programs v. *Newport News Shipbuilding & Dry Dock Co.*,
514 U.S. 122 (1995) 23

Dohany v. *Rogers*,
281 U.S. 362 (1930) 9

Dolan v. *U.S. Postal Serv.*,
546 U.S. 481 (2006) 21

Dorsey v. *United States*,
132 S.Ct. 2321 (2012) 23

Eastern Enterprises v. *Apfel*,
524 U.S. 498 (1998) ..... passim

Ex parte Young,
209 U.S. 123 (1908) 25

First English Evangelical Lutheran Church v. *Los Angeles Cnty.*,
482 U.S. 304 (1987) 5, 14

Fletcher v. *Peck*,
6 Cranch 87 (1810) 23

Freeman v. *Quicken Loans, Inc.*,
132 S.Ct. 2034 (2012) 23

Herrera v. *United States*,
222 U.S. 558 (1912) 20

Hudson v. *Palmer*,
468 U.S. 517 (1984) 14

Hurley v. *Kinkaid*,
285 U.S. 95 (1932) 13

Joslin Mfg. Co. v. *City of Providence*,
262 U.S. 668 (1923) 9

Lambert v. *California*,
355 U.S. 225 (1957) 18

Landgraf v. *USI Film Prods.*,
511 U.S. 244 (1994) 21

Lockhart v. *United States*,
546 U.S. 142 (2005) 23

Mo. Pac. Ry. Co. v. *Nebraska*,
217 U.S. 196 (1910) 8

Missouri v. *Chi., Burlington & Quincy R.R. Co.*,
241 U.S. 533 (1916) 25

Mitchell v. *United States*,
267 U.S. 341 (1925) 19

Morales v. *Trans World Airlines, Inc.*,
504 U.S. 374 (1992) 8

Morrisdale Coal Co. v. *United States*,
259 U.S. 188 (1922) 8

Parratt v. *Taylor*,
451 U.S. 527 (1981) 13, 14

Pumpelly v. *Green Bay & Miss. Canal Co.*,
80 U.S. 166 (1871) 9

Reg'l Rail Reorganization Act Cases,
419 U.S. 102 (1974) 5, 11

Reichelderfer v. *Quinn*,
287 U.S. 315 (1932) 23

Rodriguez v. *United States*,
480 U.S. 522 (1987) 22

Ruckelshaus v. *Monsanto Co.*,
467 U.S. 986 (1984) 10, 11, 12, 14

San Remo Hotel, L.P. v. *City & Cnty. of S.F.*,
545 U.S. 323 (2005) 4, 15

Stop the Beach Renourishment, Inc. v. *Fla. Dept. of Envtl. Prot.*,
130 S.Ct. 2592 (2010) 15

Suitum v. *Tahoe Reg'l Planning Agency*,
520 U.S. 725 (1997) 16

Tempel v. *United States*,
248 U.S. 121 (1918) 19

United States v. *Causby*,
328 U.S. 256 (1946) 20

United States v. *Comstock*,
130 S.Ct. 1949 (2010) 18

United States v. *Lopez*,
514 U.S. 549 (1995) 18

United States v. *Stevens*,
130 S.Ct. 1577 (2010) 18

W. Va. Univ. Hospitals, Inc. v. *Casey*,
499 U.S. 83 (1991) 21

Western Union Tel. Co. v. *Penn. R.R. Co.*,
195 U.S. 540 (1904) 8

Wilkie v. *Robbins*,
551 U.S. 537 (2007) 15

Williamson Cnty. Reg'l Planning Comm'n v.
Hamilton Bank,
473 U.S. 172 (1985) ..... passim

Yates v. *Milwaukee*,
77 U.S. 497 (1870) 9

Yearsley v. *W.A. Ross Constr. Co.*,
309 U.S. 18 (1940) 13

STATUTES

7 U.S.C. §608c(14) 22

7 U.S.C. §608c(14)(B) 18

28 U.S.C. §1491(a)(1) 4, 17, 19

42 U.S.C. §1983 ..... 6, 13

OTHER AUTHORITIES

C. Wright et al., Federal Practice & Procedure §3532 (3d ed. 2008)..... 5

R. Brauneis, "The Foundation of Our 'Regulatory Takings' Jurisprudence": The Myth and Meaning of Justice Holmes's Opinion in *Pennsylvania Coal Co.* v. *Mahon*, 106 Yale L.J. 613 (1997)..... 9

IDENTITY AND INTEREST OF *AMICI CURIAE*

Amici curiae are the following constitutional law professors and legal scholars:[1]

- Samuel L. Bray, Assistant Professor of Law, UCLA School of Law;
- Erin Morrow Hawley, Associate Professor of Law, University of Missouri School of Law;
- Joshua D. Hawley, Associate Professor of Law, University of Missouri School of Law;
- Mark R. Lee, Professor in Residence and J. Lawrence Irving Senior Distinguished Teaching Fellow, University of San Diego School of Law;
- Robert J. Pushaw, James Wilson Endowed Professor, Pepperdine University School of Law.

---

[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici* certifies that this brief was not authored in whole or in part by counsel for any party, and no person or entity other than *amici* or their counsel has made a monetary contribution to the preparation or submission of this brief. Pursuant to Rule 37.3(a), letters of consent from all parties to the filing of this brief have been filed with the Clerk.

Amici are concerned about this Court's holding in *Williamson County Regional Planning Commission* v. *Hamilton Bank*, 473 U.S. 172 (1985), that, as a matter of constitutional ripeness, federal courts are without jurisdiction to hear Fifth Amendment takings claims unless and until property owners exhaust all potential avenues for obtaining compensation. This "ripeness" rule has introduced acute confusion in the lower federal and state courts and prevented scores of litigants from raising perfectly valid Fifth Amendment claims in federal court. It is *amici*'s position that the constitutional ripeness requirement announced in *Williamson County* is mistaken and should be abandoned.

SUMMARY OF ARGUMENT

The court of appeals wrongly concluded that it lacked jurisdiction to consider the Hornes' Takings Clause defense to the government's enforcement action.

I. There is no constitutional barrier to jurisdiction. The Hornes' Takings Clause defense is fully ripe under Article III, despite the fact they have not litigated a separate claim for just compensation. The Constitution compels no such litigation as a prerequisite to raising a Takings Clause defense. The litigation "ripeness" requirement fashioned by this Court in *Williamson County Regional Planning*

Commission v. *Hamilton Bank*, 473 U.S. 172 (1985), is mistaken.

Williamson County confused the availability of particular *remedies* with the question of constitutional *ripeness*. Black-letter remedies doctrine holds that a litigant may not win equitable relief where there is a "reasonable, certain, and adequate" remedy at law. *Cherokee Nation* v. *Southern Kan. Ry. Co.*, 135 U.S. 641, 659 (1890). Traditionally, this Court interpreted an "adequate" remedy at law in the Takings Clause context to be a government-provided mechanism for obtaining just compensation. In takings cases, the Court inquired as to whether this legal remedy was available, and if it was, the Court denied the property owner equitable relief.

None of this had anything to do with constitutional ripeness. Not until *Williamson County* did the Court hold that property owners must exhaust what it had previously characterized as a remedy at law—a government-provided mechanism for obtaining compensation—before a takings claim could even be heard in federal court. Tellingly, none of the cases on which *Williamson County* relied embraced this litigation requirement, because none were about ripeness. On the contrary, all the takings cases *Williamson County* cited were about remedies.

Williamson County's invented doctrine of constitutional ripeness has caused considerable confusion. See, *e.g.*, *San Remo Hotel, L.P.* v. *City & Cnty. of S.F.*, 545 U.S. 323, 351, 352 (2005) (Rehnquist, C.J., concurring) (the *Williamson County* litigation requirement's "justifications" are "suspect, while its impact on takings plaintiffs is dramatic"). It has been widely criticized. The Court should abandon it now.

II. Nor does the Tucker Act deprive the district court of jurisdiction to hear the Hornes' Takings Clause defense. The Tucker Act covers only suits for money damages against the United States—not constitutional defenses raised in enforcement proceedings. See 28 U.S.C. §1491(a)(1). But the Tucker Act does not provide the sort of "reasonable, certain, and adequate" remedy at law that eliminates the need for equitable relief. *Cherokee Nation*, 135 U.S., at 659. The usual rules of statutory interpretation indicate that the Tucker Act does not make money damages available when the statute authorizing a property invasion demonstrates no intent to provide payment for taken property. In these cases, "the presumption of Tucker Act availability is reversed." *Eastern Enterprises* v. *Apfel*, 524 U.S. 498, 521 (1998) (quotation marks and citations omitted) (plurality opinion). And, in any event, the Hornes need not show that a damages remedy is unavailable, because they are entitled to defend against a government penalty by

showing that the penalty is predicated on an unconstitutional property invasion.

ARGUMENT

I. PETITIONERS' TAKINGS CLAUSE DEFENSE IS RIPE UNDER ARTICLE III, AND *WILLIAMSON COUNTY*'S LITIGATION "RIPENESS" REQUIREMENT IS MISTAKEN.

The court of appeals erred in holding that the Hornes' Takings Clause defense is "premature" or not ripe. JA 304, 306. Article III ripeness bars adjudication of premature claims—that is, claims for injuries that have not yet come to pass and are purely speculative. See 13B C. Wright et al., Federal Practice & Procedure §3532 (3d ed. 2008). But a property invasion that has already occurred is hardly speculative. That is why this Court has said that liability under the Takings Clause arises at the time the government interferes with property rights, not at some later date when a court rules that property was taken. *First English Evangelical Lutheran Church* v. *Los Angeles Cnty.*, 482 U.S. 304, 319 (1987). More specifically, the Hornes' injury here—the imposition of a monetary fine—"is in no way hypothetical or speculative." *Reg'l Rail Reorganization Act Cases*, 419 U.S. 102, 143 (1974).

1. The court of appeals' mistaken view, that the Hornes' takings defense is "premature" until they raise the claim in a Tucker Act lawsuit in the Court of Federal Claims, rests on the ripeness test fashioned in *Williamson County Regional Planning Commission* v. *Hamilton Bank*, 473 U.S. 172 (1985). In *Williamson County*, a land developer filed a 42 U.S.C. §1983 suit in federal district court, alleging a taking after a regional planning commission rejected the developer's preliminary plat proposal. *Id.*, at 190. The developer had not requested variances from the commission, had not appealed the commission's denial of the preliminary plat to the zoning board of appeals, and had not brought a state-law inverse condemnation suit. *Id.*, at 188.

Williamson County held that the developer's takings claim was not ripe for two reasons. First, the commission had denied only the *preliminary* plat. *Id.*, at 193-194. The developer never sought variances from the commission, so the commission's denial was "not a final, reviewable decision." *Id.*, at 194; see *id.*, at 186 (a takings claim is "not ripe until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue").

The Court might have stopped there. Instead, it gave "[a] second reason the taking claim is not yet ripe": namely, that the developer "did not seek compensation through the procedures the State has provided for doing so," including litigation. *Id.*, at 194; see *id.*, at 194-197. In the present case, it is this second interpretation of constitutional "ripeness" that was the basis of the court of appeals' erroneous conclusion that it lacked jurisdiction. This litigation ripeness requirement also has confounded numerous other federal and state courts and has badly confused the law of takings. Simply put, *Williamson County*'s second "ripeness" requirement is a mistake.

Williamson County's constitutional ripeness rule confuses the question of *ripeness* with the question of *remedies*. That is, *Williamson County* took a requirement for when equitable relief is generally available—there must be no adequate remedy at law—and converted it into a constitutional ripeness holding. Properly understood, the availability of an adequate remedy at law is a remedial question, not a jurisdictional one.

For more than a century before *Williamson County*, this Court said that when the government takes property without providing a "reasonable, certain, and adequate provision for obtaining compensation," property owners could obtain equitable relief in federal court

preventing the government from invading property. *Cherokee Nation*, 135 U.S., at 659. In practice, this meant injunctive relief was often granted when the statute or government regulation provided an insufficient mechanism for obtaining payment in the case of a Fifth Amendment violation. See *id.*, at 658-659. This was an application of black-letter remedies law. See, *e.g.*, *Morales* v. *Trans World Airlines, Inc.*, 504 U.S. 374, 380-381 (1992) ("It is a basic doctrine of equity jurisprudence that courts of equity should not act . . . when the moving party has an adequate remedy at law and will not suffer irreparable injury if denied equitable relief." (quotation marks omitted)).

The Court therefore enjoined takings where the statute or government activity made inadequate provision for payment. See, *e.g.*, *Morrisdale Coal Co.* v. *United States*, 259 U.S. 188, 190 (1922) ("If the law requires a party to give up property to a third person without adequate compensation the remedy is, if necessary, to refuse to obey it, not to sue the lawmaker."); *Mo. Pac. Ry. Co.* v. *Nebraska*, 217 U.S. 196, 205 (1910) ("no provision in the statute for compensation" meant government action was subject to equitable relief); *Western Union Tel. Co.* v. *Penn. R.R. Co.*, 195 U.S. 540, 574-575 (1904) (statute not valid exercise of takings power because remedies in statute not adequate); *D.M. Osborne & Co.* v. *Mo. Pac. R.R. Co.*, 147 U.S. 248, 258-259 (1893) (injunctive

relief available in view of inadequacy of legal remedy); *Pumpelly* v. *Green Bay & Miss. Canal Co.*, 80 U.S. 166, 177 (1871) (construing Wisconsin constitutional provision "almost identical" to federal Takings Clause as invalidating statute authorizing dam that caused flooding of plaintiff's property without compensation); *Yates* v. *Milwaukee*, 77 U.S. 497, 506-507 (1870) (enjoining municipal action to remove dock and wharf upon mere legislative declaration that facilities constituted nuisance and without compensation). See generally R. Brauneis, "The Foundation of Our 'Regulatory Takings' Jurisprudence": The Myth and Meaning of Justice Holmes's Opinion in *Pennsylvania Coal Co.* v. *Mahon*, 106 Yale L.J. 613, 686-689 (1997).

The Court, meanwhile, denied injunctive relief where the government took property while providing an adequate mechanism to compensate the property owner. See, *e.g.*, *Dohany* v. *Rogers*, 281 U.S. 362, 365 (1930) (statute that provided for compensation constituted valid exercise of takings power not subject to injunction); *Joslin Mfg. Co.* v. *City of Providence*, 262 U.S. 668, 689 (1923) (upholding statute providing for takings subject to compensation award); *Bragg* v. *Weaver*, 251 U.S. 57, 62 (1919) (upholding statute providing for taking of earth for road construction, with compensation determined in post-taking procedure before commissions).

In sum, the availability of equitable relief turned on the availability of an adequate remedy at law. *Williamson County* obscured this long-standing remedial distinction by holding that property owners could not bring a Fifth Amendment takings claim in federal court at all unless and until the owner had availed himself of any procedures the government may have offered for obtaining compensation. 473 U.S., at 195. But none of this Court's prior jurisprudence suggested that the availability of a damages lawsuit to obtain compensation required property owners to use it *before* their takings claim could become ripe under Article III. The presence or absence of a compensation mechanism determined, instead, what sort of remedy was available should the government action be found to violate the Fifth Amendment.

Williamson County's newly invented Article III ripeness requirement not only misread the Court's cases, it also confused the law of remedies. The *Williamson County* litigation requirement suggests equitable relief may never be available as a remedy for a takings claim, at least not until the property owner has first sought money damages in the appropriate forum. See *Ruckelshaus* v. *Monsanto Co.*, 467 U.S. 986, 1016 (1984); but see *Eastern Enterprises* v. *Apfel*, 524 U.S. 498, 520-521 (1998) (plurality opinion). None of this Court's prior cases required this result.

2. Indeed, the takings cases on which *Williamson County* explicitly relied were all about remedies, not ripeness.

In support of its constitutional ripeness holding, the *Williamson County* Court first cited the *Regional Rail Reorganization Act Cases*, 419 U.S. 102 (1974), for the proposition that there is no takings violation when an adequate post-deprivation procedure for seeking compensation exists. *Williamson Cnty.*, 473 U.S., at 194. But the Court there simply reversed a decision enjoining enforcement of a statute, because the availability of a Tucker Act suit provided an adequate remedy at law for any takings that might occur. *Regional Rail Reorganization Act Cases*, 419 U.S., at 119, 149. It did not state that the availability of a Tucker Act suit *prevents* a Taking Clause violation from occurring or ripening, but simply that it provides a "*remedy* at law" for a violation that has already occurred. *Id.*, at 149 (emphasis added).

Ruckelshaus v. *Monsanto*, 467 U.S., at 1016-1020, another case cited by *Williamson County*, is also about remedies. *Monsanto* concerned the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), which provides an administrative arbitration mechanism for one party to obtain compensation from another after the second party relies on data that the first disclosed to the EPA. *Id.*, at 994-995. *Monsanto* read this

FIFRA arbitration provision "as implementing an exhaustion requirement as a precondition to a Tucker Act claim" for takings. *Id.*, at 1018. Thus, regardless of the outcome of that arbitration, a takings claim for just compensation could still be pursued under the Tucker Act. *Id.*, at 1017-1019. Injunctive relief was therefore improper in that case given that "an adequate remedy for the taking exists under the Tucker Act." *Id.*, at 1019.

After addressing that takings remedial issue and concluding that FIFRA implemented an administrative exhaustion requirement, *Monsanto* reached the unremarkable conclusion that the data owner's "due process" and "delegation" challenges, *id.*, at 999, to the FIFRA arbitration procedure were not ripe. *Id.*, at 1019-1020. *Monsanto* found these non-takings challenges to the FIFRA procedure premature because "no arbitration ha[d] yet occurred with respect to any use of Monsanto's data," and "Monsanto did not allege or establish that it had been injured by actual arbitration under the statute." *Id.*, at 1013, 1019.

Williamson County mistakenly attributed *Monsanto*'s ripeness holding to Monsanto's takings claim—rather than its due process and delegation claims. See *Williamson Cnty.*, 473 U.S., at 195 (stating that *Monsanto*'s ripeness holding applied to takings claim). But *Monsanto* held only that the *due process and delegation*

"challenges to the constitutionality of the arbitration and compensation scheme [were] not ripe," because the FIFRA arbitration or subsequent Tucker Act remedies could make Monsanto whole such that Monsanto lacked any injury from the FIFRA arbitration procedure. *Monsanto*, 467 U.S., at 1019.

The *Williamson County* Court also cited *Yearsley* v. *W.A. Ross Construction Co.*, 309 U.S. 18 (1940), and *Hurley* v. *Kinkaid*, 285 U.S. 95, 104 (1932). Neither had anything to do with ripeness. *Yearsley* held that a property owner complaining of a taking performed by government contractors acting within the scope of their duties should sue the government for damages rather than the contractors, because the acts of the agents are the acts of the government. 309 U.S., at 22. As for *Hurley*, that case merely held that a party cannot enjoin an acknowledged taking when Congress has provided an adequate procedure for obtaining just compensation. 285 U.S., at 104.

Lastly, *Williamson County* supported its view of the Takings Clause by analogy to the due process case *Parratt* v. *Taylor*, 451 U.S. 527 (1981), *overruled in part by Daniels* v. *Williams*, 474 U.S. 327 (1986). *Parratt* held that although a prisoner's complaint that prison officials lost a hobby kit did constitute a deprivation of property under color of state law, the claim was not actionable under 42 U.S.C. §1983 as a

procedural due process violation because the state provided a postdeprivation remedy. 451 U.S., at 543-544. Reasoning by analogy, *Williamson County* applied *Parratt*'s due process holding to the takings context by stating that a "State's action is not 'complete' in the sense of causing constitutional injury 'unless or until the State fails to provide an adequate postdeprivation remedy for the property loss.'" 473 U.S., at 195 (quoting *Hudson* v. *Palmer*, 468 U.S. 517, 532, n.12 (1984)).

This analogy is flawed. Liability under the Takings Clause arises at the time the government interferes with property rights, not at some later date when a court rules that property was taken. *First English*, 482 U.S., at 319. Furthermore, *Parratt*'s holding was predicated on a "random and unauthorized act by a state employee." *Parratt*, 451 U.S., at 541. Because predeprivation hearings were "impossible or impracticable," *Parratt* required the prisoner to resort to postdeprivation remedial process. *Williamson Cnty.*, 473 U.S., at 195. Even *Williamson County* acknowledged that *Parratt* was an "imperfect" analogy because it does not extend to situations "in which the deprivation of property is effected pursuant to an established state policy or procedure, and the State could provide predeprivation process." *Id.*, at 195, n.14. But takings nearly always occur because of an established policy or procedure.

The predicate for *Parratt*'s decision is absent here.

Neither *Parratt* nor any of the Takings Clause cases cited by this Court in *Williamson County* justify its characterization of the Clause as requiring compensation only at the conclusion of a post-taking claims process. See *San Remo Hotel*, 545 U.S., at 349 (Rehnquist, C.J., concurring) (noting that while "*Williamson County* purported to interpret the Fifth Amendment," its interpretation is "not obvious"); see also *Wilkie* v. *Robbins*, 551 U.S. 537, 583 (2007) (GINSBURG, J., dissenting) (concluding that a property owner validly refused to cede an easement to the government where "no compensation [was] in the offing," as the Takings Clause "confers on him the right to insist upon compensation as a condition of the taking of his property").

3. This Court's decision in *Williamson County* mistook the remedies analysis outlined above for a question of Article III ripeness. See 473 U.S., at 194-197. This error has caused much, and unnecessary, confusion in the lower courts. See *San Remo Hotel*, 545 U.S., at 351 (Rehnquist, C.J., concurring) (stating that the litigation requirement "created some real anomalies, justifying our revisiting the issue"), *quoted in Stop the Beach Renourishment, Inc.* v. *Fla. Dept. of Envtl. Prot.*, 130 S.Ct. 2592, 2618 (2010) (KENNEDY, J., concurring in part and

concurring in the judgment). The Court itself has not always followed it. See *Stop the Beach*, 130 S.Ct., at 2610 (unanimously ruling that the litigation requirement is not "jurisdictional"); *Apfel*, 524 U.S., at 520-521 (plurality opinion) (litigation requirement does not apply when "claim for compensation would entail an utterly pointless set of activities" (quotation marks and citations omitted)); *City of Chi.* v. *Int'l Coll. of Surgeons*, 522 U.S. 156, 166 (1997) (permitting defendants to remove regulatory takings claims to federal court before state litigation over just compensation was complete); *Suitum* v. *Tahoe Reg'l Planning Agency*, 520 U.S. 725, 734 (1997) (*Williamson County*'s litigation ripeness requirement is merely a "prudential hurdle[]").

The Court should correct this error now. The availability (or not) of injunctive relief for a takings claim does not depend on first filing a suit in another court. It depends instead on whether the government makes available "reasonable, certain, and adequate provision for obtaining compensation." *Cherokee Nation*, 135 U.S., at 641. The Hornes' Takings Clause defense is ripe.

II. THE DISTRICT COURT HAD JURISDICTION TO HEAR PETITIONERS' TAKINGS CLAUSE DEFENSE.

The Tucker Act does not deprive the district court of jurisdiction over the Hornes' Takings Clause defense. To begin with, the Tucker Act

has nothing to say about constitutional *defenses* seeking to quash penalties; it provides a forum to adjudicate suits for money damages against the United States. See 28 U.S.C. §1491(a)(1). Moreover, the Tucker Act does not provide the sort of "reasonable, certain, and adequate" remedy at law that obviates the need for equitable relief. *Cherokee Nation*, 135 U.S., at 659. The Tucker Act cannot be faithfully interpreted to make money damages available for every government action; when a statute demonstrates no intent to provide payment for taken property, the Tucker Act does not apply. See *Apfel*, 524 U.S., at 521 (plurality opinion). And, in any event, the Hornes need not show that a damages remedy is unavailable. The Hornes' defense succeeds if the marketing order is unconstitutional, and the existence of a damages remedy for an unconstitutional taking does not change the fact that the government had no authority to take raisins without just compensation in the first place.

1. The plain text of the Tucker Act makes clear that the Hornes' Takings Clause defense does not trigger the exclusive jurisdiction of the Court of Federal Claims. The Act gives that court jurisdiction over any "claim against the United States for money damages exceeding $10,000." *Apfel*, 524 U.S., at 520 (plurality opinion) (citing 28 U.S.C. §1491(a)(1)). But the Hornes' constitutional attack on the USDA raisin reserve program is not a claim for money

damages. It is a defense to the government's own enforcement action. The district court—not the Court of Federal Claims—had jurisdiction to review the USDA's enforcement order, 7 U.S.C. §608c(14)(B), and thus jurisdiction to consider any defenses to it.

In ruling to the contrary, the court of appeals misunderstood the nature of the Hornes' Takings Clause defense. The Hornes argue that the government lacks authority to impose the monetary penalty because it lacks authority to compel them to turn over their raisins under the Takings Clause, at least without appropriate compensation. The Hornes thus invoke the Takings Clause as a *limit* on government action, in the same way that defendants may raise Commerce Clause, First Amendment, or Due Process Clause challenges to dismiss civil or criminal proceedings. See, *e.g.*, *United States* v. *Comstock*, 130 S.Ct. 1949 (2010) (Commerce Clause challenge to civil commitment action); *United States* v. *Stevens*, 130 S.Ct. 1577 (2010) (First Amendment challenge to crush-video prosecution); *United States* v. *Lopez*, 514 U.S. 549 (1995) (Commerce Clause challenge to gun-possession prosecution); *Lambert* v. *California*, 355 U.S. 225 (1957) (Due Process Clause challenge to felon-registration prosecution).

Contrary to the court of appeals' perception, the Hornes are not conceding that the raisin

reserve program is valid and challenging only the USDA's authority to impose monetary liability for failing to turn over raisins. If the reserve program is lawful, the agency of course may impose a penalty for noncompliance. The Hornes' defense is that the Takings Clause denies the government authority to implement the raisin reserve program at all, precisely because it provides no mechanism for paying just compensation at the time the government takes raisins. This is not a claim for money damages, so it does not come within the jurisdiction of the Court of Federal Claims.

2. Moreover, the Tucker Act is not an "adequate" remedy in this case, *Cherokee Nation*, 135 U.S., at 659—or in any case where a congressional statute makes no provision for and reflects no intent to provide just compensation for a property invasion.

By its terms, the Tucker Act applies to claims "founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, . . . *in cases not sounding in tort*." 28 U.S.C. §1491(a)(1) (emphasis added). For seventy years, this Court interpreted that language to make the Act applicable only where the government acknowledged it was using its power of eminent domain, as opposed to its other regulatory powers. See, *e.g.*, *Mitchell* v. *United States*, 267 U.S. 341, 345 (1925) ("There can be no recovery under the Tucker Act if the

intention to take is lacking."); *Tempel* v. *United States*, 248 U.S. 121, 129-130 (1918) ("[U]nder the Tucker Act, the consent of the United States to be sued is (so far as here material) limited to claims founded 'upon any contract, express or implied'; and a remedy for claims sounding in tort is expressly denied. . . . [I]n the case at bar, both the pleadings and the facts found preclude the implication of a promise to pay."); *Herrera* v. *United States*, 222 U.S. 558, 563 (1912) ("the record does not show a 'convention between the parties' or circumstances from which a contract could be implied, and that therefore the case is one sounding in tort, and claimants have no right of recovery"); *Bigby* v. *United States*, 188 U.S. 400, 406-408 (1903) (stating that the Tucker Act requires a "meeting of the minds of the parties," i.e., "an agreement to pay for that which was used for the government").

The Court apparently abandoned that distinction in *United States* v. *Causby*, 328 U.S. 256 (1946)—although it never discussed the question, or the earlier cases, directly. But even so, ordinary tools of statutory interpretation indicate that the Tucker Act should not apply when a later-enacted statutory scheme regulates property but demonstrates no intent to provide payment. See *Apfel*, 524 U.S., at 521 (plurality opinion) (noting that the Tucker Act does not apply where claim for compensation "would entail an utterly pointless set of activities").

Statutory interpretation must proceed according to "the purpose and context of the statute." *Dolan* v. *U.S. Postal Serv.*, 546 U.S. 481, 486 (2006). The Tucker Act undoubtedly provides a means of obtaining compensation for some government actions. The text of the Act makes this much clear. But to interpret it to make compensation available for *any* and *all* government activities would defeat the operation of numerous other statutes and regulations. This would make "nonsense" rather than "sense . . . out of the *corpus juris*." *W. Va. Univ. Hospitals, Inc.* v. *Casey*, 499 U.S. 83, 101 (1991), *superseded by statute as recognized in Landgraf* v. *USI Film Prods.*, 511 U.S. 244, 251 (1994).

Consider, for example, the Coal Act's regulations of property owners at issue in *Eastern Enterprises* v. *Apfel*, 524 U.S. 498. The Coal Act compelled coal companies to pay money into a healthcare fund run for the benefit of coal-industry employees. The point of the statute was to provide for coal workers' health needs *using private dollars*. See *id.*, at 514-515 (plurality opinion). Eastern Enterprises brought suit in federal district court challenging the payment mandate as a taking without compensation. See *ibid.* This Court had to decide whether the Tucker Act required Eastern first to file a reverse-condemnation claim in the Court of Federal Claims. A plurality of the Court concluded that it did not. See *id.*, at 521.

The Tucker Act did not apply, the plurality reasoned, because the availability of government compensation would render the statutory scheme pointless. See *ibid.*

The plurality's reasoning was succinct. "Congress could not have contemplated that the Treasury would compensate coal operators for their liability under the Act, for every dollar paid pursuant to a statute would be presumed to generate a dollar of Tucker Act compensation." *Ibid.* (quotation marks and citations omitted). If government compensation was available to reimburse the property owners for the monies they paid in, the private healthcare fund would become a government fund instead—just the opposite of what the statute provided for. *Ibid.* Given this, "a claim for compensation would entail an utterly pointless set of activities." *Ibid.* (quotation marks and citations omitted). Likewise, Congress could not have allowed handlers to be fined under the Agricultural Marketing Agreement Act for failing to comply with a marketing order, 7 U.S.C. §608c(14), while simultaneously allowing handlers to seek compensation for those fines as takings under the Tucker Act.

This Court has held time and again that "no legislation pursues its purposes at all costs." *Rodriguez* v. *United States*, 480 U.S. 522, 525-526 (1987) (*per curiam*). Rather, "[e]very statute

proposes, not only to achieve certain ends, but also to achieve them by particular means." *Director, Office of Workers' Comp. Programs* v. *Newport News Shipbuilding & Dry Dock Co.*, 514 U.S. 122, 136 (1995). Interpreters must be attentive to both ends and means, giving effect to the two together. See *Freeman* v. *Quicken Loans, Inc.*, 132 S.Ct. 2034, 2044 (2012) (statutory purpose must be understood in light of statute's "particular language"). But to interpret the Tucker Act to provide compensation for potentially every government regulation, no matter what the cost, and no matter how absurd such compensation would render the regulatory scheme, disregards these instructions.

Congress is perfectly free to craft exemptions from its own earlier statutes. See, *e.g.*, *Reichelderfer* v. *Quinn*, 287 U.S. 315, 318 (1932); *Fletcher* v. *Peck*, 6 Cranch 87, 135 (1810). It may do so "either expressly or by implication as it chooses." *Dorsey* v. *United States*, 132 S.Ct. 2321, 2331 (2012); accord *Lockhart* v. *United States*, 546 U.S. 142, 148 (2005) (SCALIA, J., concurring) ("Among the powers of a legislature that a prior legislature cannot abridge is, of course, the power to make its will known in whatever fashion it deems appropriate—including the repeal of pre-existing provisions by simply and clearly contradicting them.").

Where a statute or regulatory scheme burdens private property but makes no provision for payment, and when government compensation would in fact defeat the very operation of the statute, Congress should be understood to have withdrawn Tucker Act jurisdiction. In these cases, Congress "could not have contemplated that the Treasury would compensate" aggrieved property owners if the statute was found unconstitutional. *Apfel*, 524 U.S., at 521 (plurality opinion). And had Congress been put to the choice, it may well have opted not to pursue the regulation at all rather than to pay potentially astronomical prices to see it carried into effect. In such instances, it "cannot be said that monetary relief against the Government is an available remedy" and "the presumption of Tucker Act availability must be reversed." *Ibid.* (quotation marks and citations omitted).

3. In all events, the Hornes do not have to show that there is no adequate damages remedy for an uncompensated taking of raisins under the marketing order. The Hornes are raising their constitutional challenge to that order as a defense to the penalty imposed for violating the order. The fact that a court might provide a damages remedy for a taking does not change the fact that the Hornes allege that the government had no authority to effect an uncompensated taking of raisins in the first

place—and therefore had no authority to punish noncompliance with the unconstitutional order.

This Court's opinion in *Ex parte Young*, 209 U.S. 123, 164 (1908), explained that injunctive relief is available to block unconstitutional government actions when no adequate remedy at law exists. Importantly, *Ex parte Young* also recognized that an aggrieved party may raise a constitutional *defense* without satisfying the standards for an injunction: "We do not say the company could not interpose [the constitutional claim as a] defense in an action to recover penalties or upon the trial of an indictment." *Id.*, at 165. A few years later, in *Missouri* v. *Chicago, Burlington & Quincy Railroad Co.*, 241 U.S. 533 (1916), the Court explained that *Ex parte Young*'s recognition of "the broader right to invoke a complete remedy to enjoin the law, and thus prevent the enforcement of the rates, did not take away the narrower right of a railroad *to stand upon the defensive*, and merely resist the attempt to enforce the rate in each particular case." *Id.*, at 539 (emphasis added). The suit for an injunction was simply a different mechanism—in its own way both more powerful and more limited—for raising the constitutional claim. It did not alter the ability of litigants to assert constitutional rights as a defense to civil or criminal punishment actions.

The Takings Clause therefore is available as a defense to establish that the underlying government property invasion is *ultra vires*, in the same way that other constitutional provisions may render government action invalid. When the Takings Clause is raised as a defense in this manner, there is no need to consider whether an adequate damages remedy would have existed if the property owner had complied with the regulation, turned over his property to the government, and suffered a violation of his constitutional rights. The only issue to be litigated is whether the disputed requirement of the property regulation is constitutional.

Hence, although a party may be unable to enjoin the government from procuring raisins if a "reasonable, certain, and adequate" damages remedy exists, *Cherokee Nation*, 135 U.S., at 659, parties may invoke their Takings Clause rights as a defense to a government penalty action after ignoring the government's attempt to procure their property.

CONCLUSION

For the reasons stated above, this Court should reverse the judgment of the court of appeals and remand for resolution of petitioners' Takings Clause defense on the merits.

Respectfully submitted,

SCOTT A. KELLER
Counsel of Record
J. CAMPBELL BARKER
YETTER COLEMAN LLP
221 W. Sixth St., Suite 750
Austin, Texas 78701
(512) 533-0150
skeller@yettercoleman.com

Counsel for Amici Curiae Constitutional Law Scholars in Support of Petitioners

January 16, 2013

AMICUS CURIAE BRIEF

No. 12-123

In the Supreme Court of the United States

MARVIN D. HORNE, ET AL.,
Petitioners,

v.

UNITED STATES DEPARTMENT OF AGRICULTURE,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICUS CURIAE* INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION IN SUPPORT OF RESPONDENT

JOHN D. ECHEVERRIA
Counsel of Record
VERMONT LAW SCHOOL
164 Chelsea Street
South Royalton, VT 05068
(802) 831-1386
JEcheverria@vermontlaw.edu

Counsel for Amicus Curiae

February 19, 2013

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTERESTS OF *AMICUS CURIAE* 1

INTRODUCTION AND SUMMARY OF ARGUMENT 1

ARGUMENT 3

I. Petitioners Could and Should Have Presented Their Takings Claim in a Suit Seeking Just Compensation in the U.S. Court of Federal Claims. 3

II. Petitioners' Novel Method of Presenting Their Takings Argument Fails on Multiple Grounds. 16

III. A Properly Presented Claim for Just Compensation Based on the AMMA and the Raisin Marketing Order Would Almost Certainly Fail. 30

CONCLUSION 34

TABLE OF AUTHORITIES

CASES

Arkansas Game & Fish Commission v. United States,
133 S.Ct. 511 (2012) 30

Ashwander v. TVA,
297 U.S. 288 (1936) 9

Bennis v. Michigan,
516 U.S. 442 (1996) 22

Block v. Community Nutrition Inst.,
467 U.S. 340 (1984) 33

Brown v. Legal Foundation of Washington,
538 U.S. 216 (2003) 27, 33

Calero-Toledo v. Pearson Yacht Leasing Co.,
416 U.S. 663 (1974) 22, 23

Cherokee Nation v. Southern Kansas R. Co.,
135 U.S. 641 (1890) 4

Clark v. Martinez,
543 U.S. 371 (2005) 9

Commonwealth Edison Co. v. United States,
271 F.3d 1327 (Fed. Cir. 2001) 26

Duke Power Co. v. Carolina Environmental Study Group, Inc.,
438 U.S. 59 (1978) 7, 10

Eastern Enterprises v. Apfel,
524 U.S. 498 (1998) 24, 25, 26, 27, 28

Empress Casino Joliet Corp. v. Giannoulias,
896 N.E.2d 277 (Ill. 2008) 26

First English Evangelical Lutheran Church of Glendale v. County Los Angeles, Cal.,
482 U.S. 304 (1987) 6, 7, 8, 12

Hawaii Housing Authority v. Midkiff,
467 U.S. 229 (1984) 11

Hodel v. Virginia Surface Mining & Reclamation Ass'n., Inc.,
452 U.S. 264 (1981) 7, 15, 18

Kaiser Aetna v. United States,
444 U.S. 164 (1979) 15

Kelo v. City of New London, Conn.,
545 U.S. 469 (2005) 8, 11

Larson v. Domestic & Foreign Commerce Corp.,
337 U.S. 682 (1949) 9-10

Lingle v. Chevron U.S.A., Inc.,
544 U.S. 528 (2005) 5, 6, 7, 14

Loretto v. Teleprompter Manhattan CATV Corp.,
458 U.S. 419 (1982) 31

Lucas v. South Carolina Coastal Council,
505 U.S. 1003 (1992) 22, 32

Missouri Pacific Railway Co. v. State of Nebraska,
217 U.S. 196 (1910) 10

Mobile County v. Kimball,
102 U.S. 691 (1880) 27

Palazzolo v. Rhode Island,
533 U.S. 606 (2001) 32

Palazzolo v. State,
WM 88-0297, 2005 WL 1645974 (R.I. Super. July 5, 2005) 32

Penn Cent. Transp. Co. v. City of New York,
438 U.S. 104 (1978) 2, 27, 31, 32

Phillips v. Washington Legal Foundation,
524 U.S. 156 (1998) 25

Preseault v. Interstate Commerce Commission,
494 U.S. 1 (1990) 4, 5, 18, 19

Regional Rail Reorganization Act Cases,
419 U.S. 102 (1974) 4, 10, 12, 13

Ruckelshaus v. Monsanto Co.,
467 U.S. 986 (1984) 5, 13

San Remo Hotel, L.P. v. City and County of San Francisco, Cal.,
545 U.S. 323 (2005) 15

Seaboard Air Line Ry. Co. v. United States,
261 U.S. 299 (1923) 4

Suitum v. Tahoe Regional Planning Agency,
520 U.S. 725 (1997) 16

Swisher International, Inc. v. Schafer,
550 F.3d 1046 (11th Cir. 2008) 26

Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency,
535 U.S. 302 (2002) 30

United States v. Causby,
328 U.S. 256 (1946) 4

United States v. Lee,
106 U.S. 196 (1882) 10

United States v. Mitchell,
463 U.S. 206 (1983) 4

United States v. Pewee Coal Co.,
341 U.S. 114 (1951) 31

United States v. Riverside Bayview Homes, Inc.,
474 U.S. 121 (1985) 6, 9, 19

United States v. Sperry Corp.,
493 U.S. 52 (1989) 25

Van Oster v. State of Kansas,
272 U.S. 465 (1926) 22

Webb's Fabulous Pharmacies, Inc. v. Beckwith,
449 U.S. 155 (1980) 25

Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City, 473 U.S. 172 (1985) 5, 12, 15, 16

Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1992) 11

CONSTITUTION

U.S Const. Amend. I 7

U.S. Const. Amend. V (Due Process Clause) ..... *passim*

U.S. Const. Amend. V (Takings Clause) ..... *passim*

STATUTES

N.J. Stat. § 34:15-79(d) (2009) 21

Va. Code Ann. § 15.2-730 (1997) 21

28 U.S.C. § 1346(1994) 4

28 U.S.C. § 1491(a) (1994) ..... *passim*

30 U.S.C. § 1268(a) 29

33 U.S.C. § 1232 (1996) 20

33 U.S.C. § 1319(g)(3) 29

49 U.S.C. § 46303 (2004) 21

49 U.S.C. § 30165 (2012) 20

SECONDARY SOURCES

Robert Brauneis, *The First Constitutional Tort: The Remedial Revolution in Nineteen-Century State Just Compensation Law*, 52 Vand. L. Rev. 57 (1999) 14

Thomas W. Merrill, *The Landscape of Constitutional Property*, 86 Va L. Rev. 885 (2000) 26

INTERESTS OF *AMICUS CURIAE*[1]

The International Municipal Lawyers Association (IMLA) is a non-profit organization dedicated to advancing the interests and education of local government lawyers. IMLA has an interest in the Court affirming the principle that the Takings Clause guarantees payment of compensation in the event of a taking for public use and does not prohibit a taking for public use when an opportunity to obtain compensation is available. In addition, it has an interest in the Court affirming that the Takings Clause does not provide a defense to monetary sanctions imposed as a result of a government enforcement action initiated in response to a violation of law.

INTRODUCTION AND SUMMARY OF ARGUMENT

Petitioners have needlessly complicated the vindication of their asserted rights under the Takings Clause of the Fifth Amendment by failing to file a straightforward claim for just compensation in the U.S. Court of Federal Claims. Petitioners have long participated in the raisin industry marketing program which they now believe results in a taking. Thus, they could easily have filed a claim for just compensation in the U.S. Court of Federal Claims based on this asserted taking. Instead, petitioners decided to disregard

---

[1] The parties have consented to the filing of this brief, and their letters of consent are on file with the Clerk (Rule 37.2). This brief was not written in whole or in part by the parties' counsel, and no one other than the *amicus* made a monetary contribution to its preparation (Rule 37.6).

federal law requiring that they participate in the program and now seek to invoke the Takings Clause to defend against the sanctions imposed as a result of their illegal action.

This effort should fail for three independent reasons. First, because the purpose of the Takings Clause is to provide compensation for takings, rather to stop takings from occurring, it would contradict the purpose and function of the Takings Clause to allow a party who has defied federal law and thereby blocked implementation of a federal program to defend his or her action by invoking the Takings Clause. Second, government seizures of private property for law enforcement purposes, such as forfeitures, are outside the scope of the Takings Clause. Third, government-imposed mandates to pay money in general, including but not limited to the kinds of monetary sanctions at issue in this case, are outside the scope of the Takings Clause.

While it is unlikely the Court will reach the merits of the takings issue in this case, *amici* submit that the takings argument is meritless. The raisin marketing program is best viewed as involving a regulatory restriction on property rather than an appropriation of property, and therefore the *Penn Central* analysis should govern this claim. Given the modest (if any) *net* economic burden imposed by the raisin marketing program, and the modest (if any) interference with petitioners' reasonable investment-backed expectations, the *Penn Central* claim should fail. Even if the alleged taking were analyzed under a *per se* test, the claim should fail because petitioners could not

carry the burden of demonstrating that the program has imposed any net compensable injury on them.

ARGUMENT

I. Petitioners Could and Should Have Presented Their Takings Claim in a Suit Seeking Just Compensation in the U.S. Court of Federal Claims.

Petitioners could have pursued – and indeed, as *amici* will explain, were required to pursue -- their takings claim based on the mandates of the raisin marketing program by filing suit seeking just compensation in the U.S. Court of Federal Claims. Prosecuting their claim in the claims court in the normal fashion would not have imposed any burden whatsoever on petitioners. For many decades, petitioners and their predecessors complied with the Agricultural Marketing Agreement Act ("AMMA") and the raisin marketing order, only recently coming to the view that the program results in a taking. In order to present their takings argument petitioners could have continued with their business as usual and filed suit in the claims court seeking compensation for the alleged taking of the portion of their raisin crop subject to the reserve requirement. While IMLA doubts that such a claim would have succeeded (*see* section III), there is no question petitioners would have had their day in court.

The claims court would have had jurisdiction over a suit seeking just compensation under the Takings Clause by virtue of the Tucker Act, which provides in relevant part: "The United States Court of Federal Claims shall have jurisdiction to render judgment upon

any claim against the United States founded . . . upon the Constitution . . . ." 28 U.S.C. § 1491(a). The Tucker Act waives the sovereign immunity of the United States in the U.S. Court of Federal Claims with respect to claims seeking monetary relief. *See United States v. Mitchell*, 463 U.S. 206, 217-18 (1983). The waiver applies to takings claims seeking "just compensation" under the Takings Clause because such claims are "founded" upon the Constitution. *See United States v. Causby*, 328 U.S. 256, 267 (1946). *But cf.* 28 U.S.C. § 1346 (conferring concurrent jurisdiction on the U.S. Court of Federal Claims and the federal District Courts over takings claims seeking less than $10,000).

A lawsuit seeking compensation in the claims court fully protects property interests pursuant to the Takings Clause despite the fact that it only provides after-the-fact relief. The Court has repeatedly said that the remedy for a taking need not be offered "in advance of or even contemporaneous with the taking." *Preseault v. Interstate Commerce Comm.*, 494 U.S. 1, 11 (1990). "All that is required is the existence of a 'reasonable, certain and adequate provision for obtaining compensation' at the time of the taking." *Id.* (quoting *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 125 (1974) (in turn quoting *Cherokee Nation v. Southern Kansas R. Co.*, 135 U.S. 641, 659 (1890)). In addition, the Court has recognized that a successful takings claimant is *constitutionally entitled* to pre-judgment interest as part of the compensation award. *See Seaboard Air Line Ry. v. United States*, 261 U.S. 299, 356 (1923). As a result, after-the-fact compensation fully and equitably protects property

owners from the financial effects of takings for public use.

When, as in this case, a suit seeking just compensation is available to a claimant in the U.S. Court of Federal Claims, the Takings Clause bars the claimant from filing suit in federal District Court to enjoin the alleged taking. *Preseault*, 494 U.S. at 11-17. *See also United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 127-128 (1985) ("We have held that, in general, equitable relief is not available to enjoin an alleged taking of private property for a public use, duly authorized by law, when a suit for compensation can be brought against the sovereign subsequent to the taking") (internal quotations omitted); *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1016 (1984) (reversing a District Court injunction against a taking, because the Tucker Act was available to remedy any taking that the plaintiff might suffer). In *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 544 (2005), a unanimous Court repudiated the "substantially-advances" takings test in part because it implied, contrary to these precedents, that a successful takings claim *could* lead to injunctive relief. A parallel principle applies to takings claims brought against state and local governments, so long as "a State provides an adequate procedure for seeking just compensation." *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172, 195 (1985).[2]

---

[2] *Williamson County* also rests on principles of comity and federalism not at issue in this case. As petitioners acknowledge, this case does not involve application of *Williamson County* because it does not involve a claim against a state or a unit of local government.

Three reasons support the conclusion that the Takings Clause does not authorize a suit in federal District Court to enjoin an alleged taking for public use. First, it reflects the fact that the Takings Clause "does not prohibit the taking of private property, but instead places a condition on the exercise of that power . . . ." *First English Evangelical Lutheran Church of Glendale v. Los Angeles County*, 482 U.S. 304, 314 (1987). As the Court stated, "[t]his basic understanding of the Amendment makes clear that it is designed not to limit the governmental interference with property rights *per se*, but rather to secure *compensation* in the event of . . . a taking." *Id.* (emphasis in original). Because the purpose and function of the Takings Clause are to provide compensation for a taking – rather than to prevent a taking – the appropriate remedy for a taking is a suit seeking just compensation, not a suit to block the taking from occurring.

Second, the Takings Clause generally bars a suit seeking equitable relief because a takings claim *presupposes* the government action serves a "public use," that is, a legitimate public purpose, which a federal District Court has no proper reason to block. The Takings Clause states that "private property [shall not] be taken *for public use*, without just compensation." If a government action is invalid, for example because it is arbitrary and capricious, then a court can properly prevent it from going forward. "But such an inquiry [into the validity of the government action] is logically prior to and distinct from the question whether a regulation effects a taking, for the Takings Clause presupposes that the government acted in pursuit of a valid public purpose." *Lingle*, 544 U.S.

at 543. In other words, the Takings Clause cannot provide the basis for an injunction against a taking because "[i]t does not bar government from interfering with property rights, but rather requires compensation 'in the event of an *otherwise proper interference* amounting to a taking.'" *Id.* (quoting *First English*, 482 U.S. at 315) (emphasis supplied by the Court in *Lingle*).

In this respect, the Takings Clause is different from, for example, the First Amendment or the Due Process Clause, the purposes of which include preventing government incursions upon the constitutional interests protected by those provisions. The Takings Clause, far from prohibiting takings, implicitly authorizes government to take private property, provided that the action serves a legitimate public purpose and the government is able and willing to pay just compensation (with interest).

Third, no suit seeking to block a taking will lie in federal District Court, at least so long as a Tucker Act remedy is available, because there is no unconstitutional action to enjoin. The Fifth Amendment only makes it unconstitutional to take property without paying just compensation. *See Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 297 n. 40 (1981) ("an alleged taking is not unconstitutional unless just compensation is unavailable"); *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 94 n. 39 (1978) ("if the Tucker Act remedy would be available in the event of a nuclear disaster, then [the] constitutional challenge to the Price-Andersen Act under the Just Compensation Clause must fail").

Thus, if the government has provided compensation for a taking, or even if it has merely established a "reasonable, certain and adequate" process for obtaining compensation, the property owner cannot claim a violation of the Takings Clause.

The understanding that takings claims are essentially compensatory in nature is explained by the fact that inverse condemnation doctrine derives from and is a subset of eminent domain doctrine. *See First English,* 482 U.S. at 316 ("While the typical taking occurs when the government acts to condemn property in the exercise of its power of eminent domain, the entire doctrine of inverse condemnation is predicated on the proposition that a taking may occur without such formal proceedings."). The Takings Clause implicitly recognizes the existence of the eminent domain power, one of the most venerable and important powers of government. *See Kelo v. City of New London*, 545 U.S. 469, 484-85 (2005) (cataloguing the wide variety of public purposes for which the eminent domain power can properly be deployed). Under the Takings Clause, government can exercise eminent domain so long as the taking serves a "public use" and it pays "just compensation." Given the essential equivalence of the power of eminent domain and inverse condemnation, if the government can condemn private property so long as these two conditions are satisfied, the government necessarily also can, without judicial interference, inversely condemn private property so long as these same two conditions are satisfied.

This understanding of the Takings Clause explains why the Court has rejected the idea that it should

apply a canon of constitutional avoidance in addressing takings claims. The Court has said "the possibility that the application of a regulatory program may in some instances result in the taking of individual pieces of property" provides "no justification for the use of narrowing constructions to curtail the program if compensation will in any event be available in those cases where a taking has occurred." *Riverside Bay View*, 474 U.S. at 121. "Under such circumstances, adoption of a narrowing construction does not constitute avoidance of a constitutional difficulty, [but instead] frustrates permissible applications of a statute or regulation." *Id.* at 128 (citing *Ashwander v. TVA*, 297 U.S. 288, 341-56 (1936) (Brandeis, J., concurring)); *accord Clark v. Martinez*, 543 U.S. 371, 382 (2005) (stating that the constitutional avoidance canon is "a means of giving effect to congressional intent, not of subverting it").[3]

A logical corollary of the principle that the remedy for a taking is a suit for just compensation when the Tucker Act remedy *is* available is that the Takings Clause authorizes courts to enjoin takings when the compensation remedy is *not* available. *See Larson v.*

---

[3] Given these principles, the suggestion by the United States that the Court can and should decline to enforce a federal statute based on the Takings Clause whenever it concludes that a particular law "is not properly understood to contemplate" payment of compensation "if it were found to result in a taking," U.S. Br., at 50, misapprehends the purpose and function of the Takings Clause and the Court's responsibility to enforce congressional commands; if a statute results in a taking, and Congress does not wish to pay compensation in order to maintain the statute, it is up to Congress to amend the statute.

Domestic & Foreign Commerce Corp., 337 U.S. 682, 697, n. 17 (1949) (explaining that the claimant in *United States v. Lee*, 106 U.S. 196 (1882), was entitled to seek "specific relief" for an allegedly unconstitutional taking by the United States because, "[a]t that time," there "was no remedy available by which he could have obtained compensation for the taking of his land."). The decision in *Missouri Pacific Railway Co. v. State of Nebraska*, 217 U.S. 196 (1910), upon which petitioners rely, is consistent with this understanding; in that case, the claimant was entitled to specific relief when Nebraska law provided no mechanism to seek financial compensation for the alleged taking. This exception has no application in this case because petitioners easily could have sued for just compensation in the U.S. Court of Federal Claims.

The general rule that a takings claim must proceed as a suit seeking just compensation also does not apply to government action that would produce "potentially uncompensable damages." *Duke Power Co.*, 438 U.S. at 71 n. 15. In that case the Court said that a federal District Court could resolve whether the Price-Anderson Act, which imposes a cap on liability for nuclear accidents, constituted a taking because in the event of a nuclear catastrophe plaintiffs allegedly would have no assurance of being able to obtain just compensation through the claims court. *Cf. Regional Rail Reorganization Act Cases*, 419 U.S. at 149 (rejecting argument that the Tucker Act remedy would be "inadequate" to address takings concerns raised by major federal legislation reorganizing eight major railroads). This exception does not apply here because there is no argument that the amount of just

compensation due for the alleged taking under the raisin marketing program could not be calculated.

Finally, a property owner is entitled to seek injunctive relief against a government taking on the theory that the taking does not serve a "public use." *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 241 (1984). If a planned taking is unlawful, the government is not permitted to proceed with the taking at all, whether or not the property owner can obtain compensation. Therefore, compensatory relief obviously does not constitute an appropriate remedy for a taking that allegedly does not serve a public use. *See Youngstown Sheet & Tube Co, v. Sawyer*, 343 U.S. 579, 585 (1992) (observing that injunctive relief against a taking is appropriate when the property has been "unlawfully taken"). Success on such a claim requires showing not only that the government has engaged in a "taking," but that the taking fails to serve a "public use." The latter inquiry involves a relatively deferential standard of review, akin to the rational basis test under the Due Process Clause. *See Kelo*, 545 U.S. at 483 ("For more than a century, our public use jurisprudence has wisely eschewed rigid formulas and intrusive scrutiny in favor of affording legislatures broad latitude in determining what public needs justify the use of the takings power.") While petitioners apparently disagree with the goals of the raisin marketing program, we do not understand them to have assumed the heavy burden of attempting to show that the program constitutes a taking that fails the public use test.

In the face of these settled principles, petitioners toss a good deal of chaff in the air in an effort to evade

the obvious conclusion that petitioners could and should have filed suit in the claims court for just compensation. First, petitioners mistakenly argue that the Court's precedents requiring takings claimants to pursue compensatory relief simply reflect the application of ordinary equitable principles. To the contrary, the established rule is based on the specific language and distinctive purpose of the Takings Clause. As the Court put it in *First English*, *"As its language indicates*, and as the Court has frequently noted, this provision does not prohibit the taking of private property, but instead places a condition on the exercise of this power." 482 U.S. at 394 (emphasis added); *see also Williamson County*, 473 U.S. at 195 n. 13 (*"The nature of the constitutional right* . . . requires that a property owner utilize procedures for obtaining compensation before bringing a § 1983 action) (emphasis added).

Contrary to petitioners' view, the *Regional Rail Reorganization Act Cases* lends no support to the idea that a takings claim can proceed as a suit for injunctive relief in federal District Court subject only to the traditional equity doctrine that legal remedies are to be preferred over equitable ones. In particular, contrary to petitioners' description, the Court did *not* say that a takings claim seeking injunctive relief would be "ripe" for adjudication in federal District Court so long as traditional ripeness tests were met. The Court did address the issue of ripeness, but only in the context of discussing whether the railroad's creditors and stockholders had "ripe" arguments that (1) federal railroad reorganization legislation rendered the Tucker Act remedy unavailable and (2) even if the Tucker Act remedy was available, it was inadequate as applied to

the government takeover of this railroad. The Court reversed the District Court's grant of an injunction against the alleged taking, concluding that the Tucker Act remedy was available and not facially inadequate, and therefore plaintiffs' sole recourse was a suit for just compensation in the claims court; "[a]s long as [plaintiffs] are assured fair value, with interest, for their properties, the Constitution requires nothing more." 419 U.S. at 156. Thus, this decision is entirely consistent with the understanding that, so long as a pathway for seeking compensation is open, a property owner has no substantive legal right, as a matter of takings doctrine, to seek injunctive relief against the alleged taking.

Nor does the *Monsanto* decision support petitioners' position that the federal District Courts can resolve takings claims. The Court did consider whether the Federal Insecticide, Fungicide and Rodenticide Act might involve a taking other than for a "public use," which the Court *could* properly have enjoined. Once the Court concluded that the statute served a public use, however, it recognized that prosecution of the claim that the statute resulted in a taking belonged in the court of claims not the District Court, and therefore reversed the District Court's injunction against the asserted taking. Again, this result and analysis are entirely consistent with the established understanding of the Takings Clause.

It is impossible to address or reconcile all of petitioners' other authorities, some stretching back to 13th century England, and there is no reason to try because most of them are irrelevant to the present case. Many of these older cases authorizing injunctive

relief are consistent with modern doctrine because compensatory relief apparently was not an available option. Others are rooted in the antiquated and now thoroughly superseded theory that takings claims against the government are properly framed as trespass or tort actions, rather than as "claims founded upon the Constitution." *See generally* Robert Brauneis, *The First Constitutional Tort: The Remedial Revolution in Nineteen-Century State Just Compensation Law*, 52 Vand. L. Rev. 57 (1999). Finally some of the discordant decisions appear to reflect the Court's longstanding confusion about the relationship between the Takings Clause and the Due Process Clause. As the Court explained in detail in *Lingle*, many of the Court's older decisions (now repudiated by *Lingle*) reflect a blending of takings and due process theories. Prior to *Lingle*, it *could* plausibly be contended that a government action that fails to "substantially advance a legitimate governmental interest" would, for that reason, constitute a taking. Since a government action that fails that test should not proceed at all (even if just compensation is paid), a party asserting a taking claim on that theory *was* entitled to seek equitable relief. But *Lingle* repudiated the idea that the alleged invalidity of a government action can provide the basis for a taking claim, definitively overthrowing the last vestige of the notion that a proper takings claim can support a request for injunctive relief. In short, petitioners' historical excursion has little or no relevance to modern takings doctrine or to this case; as Chief Justice Rehnquist aptly put it, "in the light of hindsight, but perhaps for the very reason that it *is* hindsight which we now exercise, the shifting back and forth of the Court in this area until the most recent decisions bears the sound of

'Old, unhappy, far-off things, and battles long ago.'" *Kaiser Aetna v. United States*, 444 U.S. 164, 177 (1979).

Petitioners also object to Court decisions characterizing suits seeking injunctive relief under the Takings Clause in federal District Court as not "ripe" or "premature" so long as the Tucker Act remedy is available. We agree that these labels are misleading, but for different reasons. The use of these terms incorrectly implies that a takings claim against the United States can proceed in federal District Court at some later stage once certain preconditions are satisfied. In fact, generally speaking, the prosecution of a takings claim demanding just compensation in the U.S. Court of Federal Claims brings the controversy to an end, whether the claimant wins or loses. Prosecution of a takings claim in the claims court does not ripen the taking claim, it resolves it. *Cf. San Remo Hotel, L.P. v. City and County of San Francisco*, 545 U.S. 323, 347-48 (2005) (state court resolution of a takings claim has preclusive effect in subsequent federal court litigation).

The only way a takings suit in federal District Court might turn out to be "premature," in the sense that the lawsuit could be renewed in federal District Court at a later time, is if the Tucker Act remedy proved unavailable or if compensation became impossible to calculate. *See Hodel*, 452 U.S. at 297 (even if a federal government action does result in a taking, "such an alleged taking is not unconstitutional unless just compensation is unavailable"). *See also San Remo Hotel*, 545 U.S. at 327 (under *Williamson County*, a taking claim against a state or local government is not "ripe" in federal court "until a State fails to provide

adequate compensation for the taking") (internal quotation omitted). Apart from these exceptional cases, the nature and purpose of the Takings Clause permanently channel takings claims against the United States away from the District Courts and into the claims court.[4]

II. Petitioners' Novel Method of Presenting their Takings Argument Fails on Multiple Grounds

Rather than pursue the standard approach of suing for just compensation in the claims court, petitioners simply disobeyed the law. Petitioners declined to hold a portion of their raisin crop (and those of other growers) in reserve, as required by the raisin industry marketing program, and instead presumably sold the entire crop in the open market. As a result of these and other violations of federal law, USDA officials filed an administrative complaint against petitioners and the USDA ultimately imposed civil penalties on them, including an assessment equivalent to the value of the raisins they failed to hold in reserve. In other words, the USDA required petitioners to disgorge their (and others') illegal profits and imposed an additional penalty as a deterrent against future illegality. Petitioners responded by arguing at each stage of the administrative and subsequent judicial enforcement process that they were threatened with a taking of

---

[4] The "finality prong" of *Williamson County*'s so-called "ripeness rules," which *does* involve application of traditional ripeness doctrine, *see Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725, 736 n. 7 (1997), is not at issue in this case.

their property and/or that the enforcement proceedings themselves constituted a taking.

Petitioners' taking argument has evolved over the course of the litigation. In the lower courts, petitioners' takings claim focused on the alleged (threatened) taking of a portion of their raisin crop as a result of the marketing program. *See* 2009 WL 4895362, *23 ("Plaintiffs assert that raisins are personal, private property and that the government has paid no just compensation for the reserve tonnage raisins that the USDA takes each year.") In this Court, petitioners have shifted the focus to the alleged taking of the money they are required to pay to the government as a consequence of their violations. At the same time, petitioners apparently still regard their claim that the raisin marketing program itself results in a taking of their crop as the core of their case. *See* Pet. Br. at 21 ("the *reason* the cash payment demands violate the Takings Clause in this case [is that] . . . the demand for payment is being used to enforce a regulation that violates the Takings Clause"). For numerous reasons, the Court should not permit this type of ersatz takings lawsuit to proceed.

First, insofar as petitioners can be understood to still claim a taking of raisins in this Court, that claim self-evidently fails because the government never disturbed petitioners' possession of any of their raisins during the relevant period. As the District Court explained, petitioners wrote to USDA stating, "we will not relinquish ownership of our crop. We put forth the money and effort to grow it, not the Raisin Administrative Committee. This is America, not a communist state." *See* 2009 WL 4895362, *23.

Petitioners thereafter refused to set aside a portion of their crop and instead retained their entire crop in the specific years at issue. Because petitioners retained possession and "ownership" of the raisins, they cannot contend that the government has "taken" any property interest in the raisins. *See Hodel*, 454 U.S. at 294 (rejecting takings claim when plaintiffs failed to "identif[y] any property in which [plaintiffs] have an interest that has allegedly been taken by operation" of a federal statute). Indeed, it borders on the absurd for petitioners to say the government took a property interest in raisins which they apparently sold in the marketplace, presumably keeping the proceeds entirely for themselves.[5]

Nor does petitioners' takings argument with respect to raisins fare any better if viewed as a request for a retrospective declaration that the government was threatening them with a taking of a portion of their raisin crop, or as a request for a prospective injunction barring future takings of raisins. As discussed above, as the Court has said many times, the Takings Clause "does not prohibit the taking of private property," *Preseault*, 494 U.S. at 11, but instead imposes conditions upon the exercise of the taking power. Because the Takings Clause authorizes rather than prohibits the taking of private property, there is no basis for sanctioning the government's past alleged takings of raisins. Nor is there any basis for a request

---

[5] In this respect petitioners stand in the same position as the petitioners in the pending *Koontz* case, who cannot claim a taking under an exactions theory because no property was actually exacted from them. *See Koontz v. St. Johns River Water Mgmt. Dist.*, No. 11-1447.

under the Takings Clause for an injunction barring the government from continuing to require petitioners to set aside a portion of their raisin crop. Because there was (and is) no barrier to petitioners filing suit seeking just compensation in the U.S. Court of Federal Claims, they were (and are) required to pursue that avenue to seek to vindicate their position.

Furthermore, the argument that the financial penalties imposed on them by the USDA constitute a taking also fails. First, the argument fails because it is a transparent effort to circumvent the principle that the Takings Clause does not prohibit a taking but merely requires payment of just compensation in exchange for a taking. For the reasons discussed above, if petitioners had sued in federal District Court seeking to enjoin the implementation of the raisin marketing program on the ground that the program results in a taking, that claim would have been instantly rejected based on *Preseault* and the other pertinent precedents discussed above. Petitioners cannot achieve indirectly what they are barred from doing directly. Allowing persons who violate regulatory requirement to raise the Takings Clause as a defense would, in practical substance, allow members of the regulated community to use the Takings Clause to enjoin the implementation of federal programs. Thus, allowing this gambit to succeed would eviscerate the principle that the Takings Clause places conditions on, but does not prohibit, the taking of private property for public use. *See Riverside Bayview Homes*, 474 U.S. at 129 n. 6 (an enforcement action "is not the proper forum for resolving" whether a regulatory program effects a taking; instead a property owner's appropriate

remedy "is to institute a suit for compensation in the Claims Court").

Adoption of petitioners' novel takings theory would contradict and seriously undermine the government's authority to proceed with lawful takings in accordance with the Takings Clause. Even if the raisin marketing program results in a taking, petitioners have no legal right to oppose implementation of the program just as, say, a citizen faced with a taking of his land by eminent domain for construction of a public roadway has no legal right to resist the seizure of his land. In both instances, so long as just compensation is available for the asserted taking and the taking serves a "public use," the government has the authority to proceed under the Takings Clause. Because an owner cannot properly resist a lawful taking, an owner cannot object based on the Takings Clause to sanctions imposed for his or her improper interference with a lawful taking. IMLA recognizes that petitioners, like all American citizens, have the ability to engage in civil disobedience. But they have no right to use their civil disobedience as a platform for raising a takings argument.

Moreover, the practical impact of petitioners' position is breathtaking. If accepted, it would provide an expansive new backdoor opportunity for raising takings arguments, as well as encourage massive law-breaking, because virtually every regulatory program at every level of government is backed up by the threat of sanctions in the event of noncompliance. *See, e.g.*, 33 U.S.C. § 1232 (1996) (authorizing $25,000 penalty for violations of Federal ports and waterways safety provisions); 49 U.S.C. § 30165 (2012) (imposing $5,000

penalty for each violation of motor vehicle safety provisions); 49 U.S.C. § 46303 (2004) (imposing $10,000 penalty for each attempt to board or actually boarding a commercial aircraft carrying a concealed and accessible dangerous weapon); N.J. Stat. § 34:15-79(d) (2009) (authorizing penalty of $5,000 for failure to comply with compulsory workers compensation insurance program); VA. Code § 15.2-730 (1997) (authorizing county government to impose schedule of penalties for violations of local ordinances regulating storage of junk and car repairs).

Second, the financial sanctions imposed on petitioners do not constitute takings because a seizure of private property for the purpose of vindicating the rule of law does not constitute a taking of private property within the meaning of the Takings Clause. Authority is sparse on whether a financial penalty for law enforcement purposes can ever constitute a taking. This is hardly surprising given that, as discussed below, government mandates to citizens to pay money to the government for any purpose are properly regarded as outside the scope of the Takings Clause. But criminal and civil forfeiture proceedings often do involve tangible property interests within the scope of the Takings Clause and decisions addressing takings claims arising from these types of proceedings provide useful guidance on whether, assuming the sanctions in this case *were* within the scope of the Takings Clause, the law enforcement purpose of these assessments would preclude treating them as potential takings.

For many decades, the Court has debated the issue of whether compelled forfeitures of tangible assets (cars, yachts, and so on) used in or in connection with

illegal activities constitute compensable takings as applied to owners who themselves engaged in no illegal conduct. *See, e.g.*, *Bennis v. Michigan*, 516 U.S. 442 (1996); *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974); *Van Oster v. Kansas*, 272 U.S. 465 (1926). The Court has understandably regarded these cases as presenting difficult questions, although the Court has generally rejected takings claims advanced by innocent owners subject to forfeiture orders. But apparently all of the Court's decisions addressing this thorny issue proceed on the premise that a compelled forfeiture of property of a person who *actually* engaged in illegal actions would not constitute a taking. This principle is so firmly embedded in the Court's precedents that it may properly be regarded as a "background principle" of property law that precludes a takings claimant from asserting a protected property interest to begin with. *See Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1027-31(1992).

Calero-Toledo, the Court's most recent, comprehensive discussion of the historical origins of federal and state forfeiture laws, traces the forfeiture process back to the "deodand" in England, which was in turn traceable to pre-Judeo-Christian practices. 416 U.S. at 681. In early English history, "[f]orfeiture also resulted at common law from conviction for felonies and treason," and early English law "provided for statutory forfeitures of offending objects used in violation of the customs and revenue laws - likely a product of the confluence and merger of the deodand tradition and the belief that the right to own property could be denied the wrongdoer." *Id.* at 682. In this country, forfeiture of estates in land resulting from a conviction for treason was prescribed by the

Constitution. *See* Art. III, § 3. But prior to the adoption of the Constitution, "the common law courts in the Colonies - and later in the states during the period of Confederation - were exercising jurisdiction in rem in the enforcement of (English and local) forfeiture statutes," and "almost immediately after adoption of the Constitution, ships and cargoes involved in customs offenses were made subject to forfeiture under federal law, as were vessels used to deliver slaves to foreign countries, and somewhat later those used to deliver slaves to this country." *Id.* at 683. None of these kinds of forfeitures has ever been regarded as a taking of private property of parties who actually engaged in unlawful activity.

In light of this legal tradition, given that petitioners plainly and willfully violated the law, the financial assessments imposed on them by the government based on their violations of the law cannot be regarded as takings of private property. Compliance with the law is the common obligation of all citizens. Various penalties, including in some instance seizures of private property, are imposed on law breakers. While a host of constitutional provisions and other legal rules guide and restrict this process, it would create a dangerous new impediment to law enforcement to suggest that every-day civil and criminal penalties imposed on law breakers can constitute takings.

Finally, petitioners cannot properly assert a takings claim in this case because a generalized imposition of financial liability, regardless of its underlying purpose, cannot constitute a taking of private property within the meaning of the Takings Clause (as opposed, say, to a deprivation of property within the meaning of the

Due Process Clause).[6] A five-justice majority recognized this principle in *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998); *see id.* at 539-45 (Kennedy, J., concurring in judgment and dissenting in part); at 554-56 (Breyer, J., dissenting, joined by Stevens, Souter, and Ginsburg), and the Court should apply this principle in this case. *Eastern Enterprises* involved a constitutional challenge to the retroactive liability provisions of federal legislation requiring coal operators to fund the health care costs of former miners. While there was no majority opinion for the Court, five justices joined in concluding that the imposition of this kind of financial liability cannot support a takings claim. As Justice Kennedy explained, "one constant limitation" in the Court's takings jurisprudence "has been that in all of the cases where the regulatory taking analysis has been employed, a specific property right or interest has been at stake." *Id.* at 541. Therefore, he concluded, the challenged legislation could not give rise to a viable takings claim. *Id.* at 540. The four dissenting justices in *Eastern Enterprises* agreed with Justice Kennedy that the claimant had no viable takings claim, because "[t]he 'private property'

---

[6] IMLA recognizes that the federal appeals court ruled that petitioners' taking claim was not ripe because they failed to pursue available remedies in the U.S. Court of Federal Claims. In arguing against this ruling, petitioners seek, in effect, to create another exception to the general rule that the exclusive remedy against the United States for an alleged taking is a suit for just compensation in the U.S. Court of Federal Claims. Whatever the merits of that argument, the more important and fundamental issue raised by this case is whether the Takings Clause provides a defense to monetary sanctions imposed for law enforcement purposes, especially when the sanctions could easily have been avoided by presenting the takings issue to the U.S. Court of Federal Claims.

upon which the [Takings] Clause traditionally has focused is a specific interest in physical or intellectual property. . . . This case involves not an interest in physical or intellectual property, but an ordinary liability to pay money . . . ." *Id.* at 554 (Breyer, J., dissenting).

As Justice Kennedy indicated in *Eastern Enterprises*, the general principle that imposition of monetary liability does not implicate the Takings Clause does not alter the fact that government seizures of specific funds contained in discrete accounts can constitute takings. *See* 524 U.S. at 540; *see, e.g., Phillips v. Washington Legal Foundation*, 524 U.S. 156 (1998) (interest income generated by funds held in IOLTA accounts constitutes property of the owner of the principal under the Takings Clause); *Webb's Fabulous Pharmacies, Inc. v. Beckwith,* 449 U.S. 155 (1980) (interest generated by funds in segregated escrow account constitutes property for takings purposes). The difference between these two types of cases is that the imposition of a generalized liability affects total wealth whereas in the case of segregated funds a government action dictating disposition of the funds affects an identifiable property interest. As the Court stated in *United States v. Sperry Corp.*, 493 U.S. 52, 66 n. 9 (1989), "[u]nlike real or personal property, money is fungible."

As a matter of first principles, the conclusion of the five-justice majority in *Eastern Enterprises* is well

supported.[7] Starting with the constitutional text, the language of the Takings Clause indicates that it does not extend to financial liabilities imposed by the government. The word "taking" in the Takings Clause is naturally read to refer to government action affecting some identifiable "thing." *See* Thomas W. Merrill, *The Landscape of Constitutional Property*, 86 Va L. Rev. 885, 976-77 (2000) ("In order to expropriate, confiscate, seize, or take property, one must identify a particular piece of property— a 'thing'—that has been expropriated, confiscated, seized, or taken."). Imposition of a generalized obligation to pay money is not within the scope of the Takings Clause because such a mandate does not affect a particular "thing." As Professor Merrill succinctly observed, "[o]ne cannot 'take' the bottom line of a balance sheet." *Id.*

If the Takings Clause were applied to monetary penalties of the kind at issue in this case, governments that levy ordinary taxes could face takings liability on the same theory. There is no clear basis for distinguishing between the types of monetary sanctions at issue in this case, the financial liability imposed in *Eastern Enterprises*, and a wide variety of public taxation programs. *See Eastern Enterprises*, 524 U.S. at 556 (Breyer, J., dissenting) (observing that the idea

---

[7] Contrary to petitioners' representation, *see* Pet Br. at 18, the overwhelming majority of lower courts have followed the lead of Justice Kennedy and the rest of the majority, not the plurality, in *Eastern Enterprises*. *See, e.g., Commonwealth Edison Co. v. United States*, 271 F.3d 1327, 1338-40 (Fed. Cir. 2001) (en banc); *Swisher International, Inc. v. Schafer*, 550 F.3d 1046 (11th Cir 2008); *Empress Casino Joliet Corp. v. Giannoulias*, 896 N.E.2d 277 (Ill. 2008).

of applying the Takings Clause to financial liabilities "bristles with conceptual difficulties," not least because "If the [Takings] Clause applies when the government simply orders A to pay B, why does it not apply when the government simply orders A to pay the government, *i.e.*, when it assesses a tax?"). Converting taxes into potential takings would be a revolutionary step, for as far back as 1880, the Court explained that "taxation for a public purpose, however great, [is not] the taking of private property for public use, in the sense of the Constitution." *Mobile County v. Kimball*, 102 U.S. 691, 703 (1880). The Court has never wavered from this position. In *Penn Central* the Court stated: "Government may execute laws or programs that adversely affect recognized economic values. Exercises of the taxing power are one obvious example." *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978). *See also Brown v. Legal Foundation of Washington*, 538 U.S. 216, 243 (2003) (Scalia, J., dissenting) ("[t]axes and user fees . . . are not takings").

Beyond all this, there is simply no need to torture the Takings Clause in an attempt to make it fit this type of case, just as the majority recognized in *Eastern Enterprise* there was no justification for torturing the Takings Clause to address the claim in that case. As Justice Kennedy stated in *Eastern Enterprises*, in a constitutional challenge to a government mandate that a citizen pay out money, "the more appropriate constitutional analysis arises under the general due process principles rather than under the Takings Clause." *Eastern Enterprises*, 524 U.S. at 545. IMLA has little doubt that if the penalty imposed on petitioners were seriously out of proportion to the

nature of their violations of federal law, the Due Process Clause could potentially provide relief.[8]

Contrary to petitioners' argument, their novel takings theory gains no support from the fact that part of the financial sanctions imposed by USDA were calculated based on the market value of raisins petitioners were required to reserve but sold instead. This fact surely does not support a claim that petitioners suffered a taking of any property interest in their raisins, because the facts otherwise refute that claim. Moreover, as the United States emphasizes, the amount of the sanctions was based in part on the volume of raisins produced by petitioners and in part on the volume of raisins they handled for other growers in their capacity as a "handler." Nor does this argument support the theory that the sanctions themselves constitute a taking of money. All of the penalties USDA imposed on petitioners were designed for the purpose of punishing them and deterring them from engaging in further illegal actions. In this light, forcing petitioners to disgorge the dollar equivalent of the profits earned from selling raisins required to be placed in reserve was well tailored to achieve USDA's law enforcement goal. The method the USDA used to

---

[8] As the United States explains, *see* U.S. Br. at 31-38, even under the reasoning of the *Eastern Enterprises* plurality, this type of monetary sanction could not support a takings claim. It would be one thing to say that a federal statute, like the Coal Act, effects a taking by directly imposing financial liabilities on certain parties. It would be quite another to say that monetary sanctions can effect a taking when they have been imposed for law enforcement purposes and only because the claimant has bypassed the opportunity to sue for a taking of a tangible property interest.

calculate part of the sanctions does not alter the fact that they were imposed for a law enforcement purpose and they represent the kind of generalized liability that has been held to fall outside of the Takings Clause.

Furthermore, this aspect of the case might well convert petitioners' case into a virtual one-off. Many, probably most statutes providing for the assessment of penalties for non-compliance with regulatory requirements call for consideration of a variety of factors that will yield penalty amounts that bear little or no direct relationship to the unrestricted value of the property at issue. For example, section 309 of the Clean Water Act states that in determining an appropriate administrative penalty the EPA "shall take into account the nature, circumstances, extent and gravity of the violation, or violations, and, with respect to the violator, ability to pay, any prior history of such violations, the degree of culpability, economic benefit or savings (if any) resulting from the violation, and such other matters as justice may require," 33 U.S.C. § 1319(g)(3). Similarly, section 518 of the federal Surface Mining Control and Reclamation Act provides that penalties, which are capped at $5,000 for each violation, shall be calculated based on "the permittee's history of previous violations at the particular surface coal mining operation; the seriousness of the violation, including any irreparable harm to the environment and any hazard to the health or safety of the public; whether the permittee was negligent; and the demonstrated good faith of the permittee charged in attempting to achieve rapid compliance after notification of the violation." 30 U.S.C. § 1268(a). Because the amounts of most civil and criminal penalties will bear little or no direct relationship to the

economic burden allegedly imposed by the underlying regulatory program, petitioners' novel method of presenting a takings argument would represent a highly unreliable way to assess whether the regulatory program itself results in a taking.

III. A Properly Presented Claim for Just Compensation Based on the AMMA and the Raisin Marketing Order Would Almost Certainly Fail.

Because petitioners have not presented a case that properly frames the issue of whether the raisin industry marketing program results in a compensable taking under the Fifth Amendment, the Court cannot proceed to address the merits of petitioners' takings claim. However, if and when such a claim is properly presented, IMLA submits that such a claim should be rejected.

First, while petitioners present the program as involving a direct appropriation of the portion of their crop they are barred from selling in the marketplace, that characterization of the program is mistaken. As the Court recently said, "[w]hen the government physically takes possession of an interest in property for some public purpose, it has a categorical duty to compensate the former owner." *Arkansas Game & Fish Commission v. United States*, 133 S.Ct. 511, 518 (2012), quoting *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, 535 U.S. 302, 322 (2002). Thus, if USDA officials came onto petitioners' land and hauled the raisins away, there would be no question that there was an appropriation, regardless of whether the interest taken was the entire crop or only a portion.

But that is not, in fact, what occurs under this program. Instead, the raisins remain under the physical control of raisin handlers. The Committee subsequently decides to whom the reserved raisins shall be sold or what other provision shall be made for disposal of the raisins.

This program surely curtails raisin producers' ability to sell their property, but the program essentially regulates rather than appropriates their interest in their crops. The government is not seizing the physical raisins and deploying them to some governmental purpose. *Cf. United States v. Pewee Coal Co.*, 341 U.S. 114 (1951). Instead, it is regulating the producers' use of property by determining how the right to sell property shall be exercised. Though the regulation is in the form of an affirmative mandate about how property shall be used rather than a restriction on how it can be used, that difference does not make the government order a direct appropriation rather than a regulation of property. *See Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 440 (1982) (government order requiring property owners to install equipment on their property would not constitute a *per se* taking).

Viewed as a potential regulatory taking, the raisin marketing order surely should survive a takings challenge under the *Penn Central* framework. Because the marketing program only affects a portion of a producer's crop each year, the program, even if it were entirely negative in its effects from a producer standpoint (which it most surely is not), probably does not result in a drastic adverse economic loss. In the years at issue in this case, the order governed the sale

of less than half of the raisin crop each year, and the petitioners reaped some economic gain even from the reserved raisins in one of these years. *Cf. Palazzolo v Rhode Island*, 533 U.S. 606 (2001) (rejecting *per se* taking claim where plaintiff retained one buildable lo in a 28-acre wetland parcel); *see also Palazzolo v Rhode Island, 2005 WL 1645974* (R.I. Super. Ct (rejecting *Penn Central* claim on remand) Furthermore, given the highly regulated nature of the raisin industry, as well as the fact that this USDA program has been in place for over 70 years, petitioner cannot plausibly contend that the program's operatio interferes with their reasonable, investment-backe expectations. Finally, it is relevant to this analysis, a the Court observed in *Lucas*, *supra*, that persona property is different from real property for the purpos of takings analysis; as the Court put it, when it come to personal property, "the state's traditionally high degree of control over commercial dealings" ought t put a property owner on notice "of the possibility tha the new regulation might even render his propert economically worthless (at least if the property's onl economically productive use is sale or manufacture fo sale)." 505 U.S. at 1027-28

Even if the program is viewed as effecting a direc appropriation of raisins, the claim should still fail. Th striking feature of this program is that it is no designed to serve some generalized public interest bu rather is primarily designed to advance the economi interests of raisin growers, including the petitioner themselves, quite possibly *at the expense* of the genera public. As the Court has stated, the primary purpos of the program is "to raise the price of agricultura products and to establish an orderly system fo

marketing them." *Block v. Cmty. Nutrition Inst.*, 467 U.S. 340, 346 (1984). In other words, the program predictably elevates the price at which raisin producers sell raisins to the public; at the same time, the program lowers the price at which reserved raisins can be sold or, on occasion, precludes producers from reaping any economic return from this portion of their crop. The effect of this price support system on consumers (a group that is fairly co-extensive with the general taxpayers responsible for takings liabilities) is almost certainly to increase the price they have to pay for raisins. More importantly from a takings perspective, the program produces a complex mix of positive and (probably) negative effects on the value of producers' raisins crop each year.

Unless petitioners can show that the *net* effect of the program is to impose economic harm on them, their takings claim will fail. Even one asserting a *per se* physical taking can only prevail if he or she can show that the government action has produced compensable harm. *See Brown*, 538 U.S. at 216 (ruling that, even on the assumption that legal clients suffered a *per se* appropriation of their property as a result of the IOLTA program, they were barred from proceeding with a claim for just compensation under the Takings Clause in the absence of a showing that they suffered a net economic loss as a result of the program). Since the majority of raisin producers, for whose economic benefit the marketing program was created in the first place, apparently support the program's continuation, it seems unlikely that raisin producers as a whole, or even individual growers, are suffering net economic loss as a result of the program's operation. In any event, the prosecution of such a takings claim will

require an attempt to show that this intuitively correc conclusion is wrong.

CONCLUSION

For the foregoing reasons, *amicus* Internationa Municipal Lawyers Association respectfully submit that the Court should affirm the judgment of the cour of appeals.

Respectfully submitted,

John D. Echeverria
Counsel of Record
Vermont Law School
164 Chelsea Street
South Royalton, VT 05068
(802) 831-1386
JEcheverria@vermontlaw.edu

Counsel for Amicus Curiae

February 19, 2013

AMICUS CURIAE BRIEF

No. 12-123

In the Supreme Court of the United States

MARVIN D. HORNE, ET AL.,
Petitioners,

v.

UNITED STATES DEPARTMENT OF AGRICULTURE,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF SUN-MAID GROWERS OF CALIFORNIA AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

Edward M. Ruckert
M. MILLER BAKER
Counsel of Record
McDERMOTT WILL & EMERY LLP
500 North Capitol Street, NW
Washington, DC 20001
(202) 756-8000
mbaker@mwe.com

Attorneys for Amicus Curiae

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTEREST OF AMICUS CURIAE 1

INTRODUCTION 2

SUMMARY OF THE ARGUMENT 4

ARGUMENT 5

I. Petitioners Cannot Assert a Takings Defense in Their Capacity as Handlers Because as Handlers Petitioners Never Had Title to the Raisins that They Failed to Reserve In Violation of the Marketing Order 5

II. If This Court Reverses the Ninth Circuit, This Court Should Make Clear that Its Holding Applies to Entities With Dual Producer/Handler Capacities 7

CONCLUSION 8

TABLE OF AUTHORITIES

Statutes

7 U.S.C. § 601 .....2, 4, 5

7 U.S.C. § 608c(1) 5

7 U.S.C. § 608c(13)(B) 5

7 U.S.C. § 608c(14)(B) 5

7 U.S.C. § 608c(15)(A) 5

28 U.S.C. § 1491(a)(1).....6

Cal. Food & Agric. Code § 54000.....1

Regulations

7 C.F.R. § 989.11.....2

7 C.F.R. § 989.15.....2

7 C.F.R. § 989.66.....6

INTEREST OF AMICUS CURIAE[1]

Sun-Maid Growers of California ("Sun-Maid") is an agricultural marketing cooperative,[2] and the largest single marketer of raisins in the world. Sun-Maid is owned by approximately 750 raisin farmers who are members, or equity owners, of the cooperative. Sun-Maid was originally founded in 1912 as the California Associated Raisin Company. The trademark "Sun-Maid," a young woman wearing a red bonnet and holding a tray of freshly-picked grapes, was first created in 1915, and the cooperative changed its name in 1922 to identify more closely with its highly successful brand. The "Sun-Maid" trademark remains one of the world's most identifiable food brands to this day.

On behalf of its 750 farmer members, Sun-Maid presently processes and markets about 30% of the California raisin crop; since California is responsible

---

[1] No counsel for any party authored this brief in whole or in part, nor did any party make a monetary contribution to the brief. Petitioners and respondent consented to the filing of this brief.

[2] Sun-Maid is incorporated under the laws of California, in particular the provisions of Cal. Food & Agric. Code §§ 54000 *et seq.*, dealing with agricultural marketing cooperatives. Pursuant to section 7.09 of Sun-Maid's Bylaws and Raisin Marketing Agreement, the cooperative is authorized to act "on behalf of each grower member under any governmental marketing agreement, order, program or plan relating to the marketing of raisins, including the exercise of any right to vote on behalf of each member."

for 40-45% of world raisin production, Sun-Maid's share of the world crop is approximately 12-15%.

Sun-Maid is a competitor of petitioners, and is subject to the same regulatory regime that petitioners flouted in this case. Like petitioners, Sun-Maid grows its own raisins, and hence is a "producer" for purposes of 7 C.F.R. § 989.11. Like petitioners, Sun-Maid also processes its own raisins, and thus is also a "handler" for purposes of 7 C.F.R. § 989.15. Unlike petitioners, who have attempted to evade long-standing regulatory requirements to gain a competitive advantage, Sun-Maid has played by the regulatory rules, and it has an interest in seeing that petitioners, as competitors, also comply with the same regulatory rules governing the raisin industry in California.

INTRODUCTION

The raisin industry in California has operated under the Agricultural Marketing Agreement Act of 1937, 7 U.S.C. § 601, *et seq.* ("AMAA") since 1949. Under the AMAA, the U.S. Department of Agriculture issued a "raisin marketing order," which only directly regulates raisin "handlers," that is, processors and packers. That order requires that handlers withhold a certain percentage of the raisin crop from the open market for a "reserve tonnage" pool administered by the Raisin Administrative Committee. Raisins allocated to the reserve tonnage typically yield marginal, if any, profit, for producers compared to raisins sold on the open market.

The purpose of the raisin marketing order is, in essence, to help maintain orderly marketing conditions through the regulation of the handling of raisin supplies. That system benefits the entire raisin industry, including petitioners, by avoiding price volatility that was endemic prior to promulgation of the raisin marketing order.

Petitioners are vertically integrated, in that they both produce and handle their own raisins. In addition, petitioners handle the raisins of other producers that are not vertically integrated. Indeed, in this case, the bulk of petitioners' liability for violations of the marketing order stems from petitioners' failure, as a handler, to comply with the marketing order for raisins produced by *other* producers. During the two periods at issue here, petitioners produced only 24.7% and 12.3%, respectively, of the raisins they handled. *See* United States Br. at 9.

Like petitioners, Sun-Maid is vertically integrated. But unlike petitioners, Sun-Maid has complied with the raisin marketing order, by allocating the designated percentage of raisins to the reserve tonnage pool, and thereby foregoing the profits potentially to be made by selling such raisins on the open market.

Petitioners, on the other hand, "willfully and intentionally" violated the raisin marketing order "to obtain an unfair competitive advantage over other California raisin handlers [such as Sun-Maid] who were in compliance with the Raisin Order." J.A. 45,

27 (findings of ALJ). That is to say, petitioners sought to take advantage of the higher market price for raisins that resulted from their competitors' compliance with the marketing order. Having been caught red-handed in their attempts to gain an unfair and illegal market advantage, petitioners now seek refuge in high constitutional principle. As discussed below and in the brief of the United States, that effort is unavailing.

SUMMARY OF THE ARGUMENT

1. The marketing order issued pursuant to the AMAA required petitioners, solely in their capacity as *handlers* of raisins produced by both themselves and other producers, to set aside a specified percentage of those raisins as reserve tonnage. Petitioners willfully defied that order, and for that are subject to civil liability as *handlers* in this enforcement action. The AMAA has no application to petitioners in this enforcement action in their capacity as *producers*.

Petitioners have no standing to assert a Takings defense in this handler enforcement action because as *handlers*, petitioners never took title to the reserve tonnage raisins subject to the marketing order, which instead transferred title from the producers directly to the Raisin Administrative Committee. If petitioners in their capacity as *handlers* had complied with the marketing order and transferred the appropriate percentage of raisins to reserve tonnage, then they and the other producers whose raisins were subject to the order could have

sought relief, as *producers*, in the Court of Claims under the Tucker Act for any taking thereby effected.

2. If this Court reverses the Ninth Circuit, this Court should be clear that its holding applies to all entities with dual producer/handler capacities.

ARGUMENT

I. Petitioners Cannot Assert a Takings Defense in Their Capacity as Handlers Because as Handlers Petitioners Never Had Title to the Raisins that They Failed to Reserve In Violation of the Marketing Order

The key that unlocks this case is the statutory distinction between "producers" and "handlers." The AMAA regulates the activities of raisin handlers, not raisin producers. *See* 7 U.S.C. § 608c(1) (authorizing the Secretary to issue marketing orders applicable to "handlers"); 7 U.S.C. § 608c(14)(B) (authorizing the Secretary to impose civil penalties on handlers for failure to comply with marketing orders); 7 U.S.C. § 608c(15)(A) ("[a]ny handler subject to an order" under the AMAA may contest a marketing order). The AMAA further specifies that "[n]o order issued under this chapter shall be applicable to any producer in his capacity as a producer." 7 U.S.C. § 608c(13)(B).

The raisin marketing order required petitioners, in their capacity as *handlers*, to set aside a certain percentage of the raisins they handled as reserve

tonnage for the Raisin Administrative Committee, rather than sell them on the open market. Petitioners failed to do so—for both raisins that they originally produced as well as raisins of other producers, which as noted above amounted to approximately 72% in one year and 87% in the following year of the raisins that petitioners handled—and thus exposed themselves to civil liability as handlers in this enforcement action brought by the government.

Petitioners indisputably have no standing to assert a Takings defense to avoid civil liability, as handlers, for failing to set aside as reserve tonnage *the raisins produced by other producers*, because as handlers petitioners never took title to raisins produced by other producers subject to the reserve tonnage requirement. Instead, the marketing order transferred title directly from the producers to the Raisin Administrative Committee. *See* 7 C.F.R. § 989.66. If petitioners had complied with the reserve tonnage requirement with respect to the raisins produced by other producers, those producers, to the extent that petitioners' compliance with the marketing order would have effected a compensable "taking," would have been required to bring a claim in the Court of Federal Claims under the Tucker Act, 28 U.S.C. § 1491(a)(1).

Petitioners similarly have no standing, in their capacity as *handlers*, to assert a Takings defense in this enforcement action for failing to set aside as reserve tonnage even raisins produced by them, because as *handlers*, petitioners never had title to

even those raisins. Like other producers whose raisins handled by petitioners that were subject to the marketing order's reserve tonnage requirement, petitioners' recourse as producers for any "taking" effected by compliance with the marketing order was to bring an action in the Court of Federal Claims.

Here, however, petitioners consciously chose to defy the marketing order, and no taking, physical or otherwise, occurred—either of raisins produced by other producers or of raisins produced by petitioners in their capacity as producers. Having willfully failed to comply with the marketing order in their capacity as handlers, petitioners are now subject to civil liability as handlers and have no standing to assert a Takings defense in this action, much less bring any subsequent action as a producer in the Court of Claims for a taking that never happened.[3]

II. If This Court Reverses the Ninth Circuit, This Court Should Make Clear that Its Holding Applies to Entities With Dual Producer/Handler Capacities

If this Court reverses the Ninth Circuit and holds that petitioners may assert their Takings defense in this handler enforcement action, Sun-Maid requests that the Court make clear that its holding applies to all entities that have dual producer/handler capacities.

---

[3] Because petitioners have no standing to assert their Takings defense, this Court could dismiss the writ of certiorari as improvidently granted rather than affirm the Court below.

CONCLUSION

For the reason provided above and in the brief of the United States, this Court should affirm the decision below if it does not dismiss the writ of certiorari as improvidently granted.

February 19, 2013

Respectfully submitted,

Edward M. Ruckert
M. MILLER BAKER
Counsel of Record
MCDERMOTT WILL & EMERY LLP
500 North Capitol Street, NW
Washington, DC 20001
(202) 756-8000
mbaker@mwe.com

Attorneys for Amicus Curiae

AMICUS CURIAE BRIEF

Supreme Court, U.S.
FILED
JAN 16 2013
OFFICE OF THE CLERK

No. 12-123

In the Supreme Court of the United States

MARVIN D. HORNE, ET AL.,
Petitioners,

v.

UNITED STATES DEPARTMENT OF AGRICULTURE,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF THE STATE OF TEXAS AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

GREG ABBOTT
Attorney General of Texas

DANIEL T. HODGE
First Assistant
Attorney General

JONATHAN F. MITCHELL
Solicitor General

ANDREW S. OLDHAM
Deputy Solicitor General
Counsel of Record

RICHARD B. FARRER
MATTHEW H. FREDERICK
DOUGLAS D. GEYSER
Assistant Solicitors General

OFFICE OF THE
ATTORNEY GENERAL
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
andy.oldham@
texasattorneygeneral.gov
(512) 936-1700

COUNSEL FOR AMICUS CURIAE

TABLE OF CONTENTS

Table of Authorities ii

Interest of Amicus Curiae 1

Summary of Argument 2

Argument 3

I. The AMAA Requires Petitioners To Pursue All Challenges To Marketing Orders Through The Administrative Review Process. 3

II. The Texas Administrative Scheme Demonstrates That Piecemeal Litigation of Takings Claims Is Unnecessary. 8

Conclusion 13

TABLE OF AUTHORITIES

Cases

Ark. Dairy Coop. Assoc. v. U.S. Dep't of Agriculture, 573 F.3d 815 (D.C. Cir. 2009).....5

Block v. Community Nutrition Institute, 467 U.S. 340 (1984).....7

City of Abeline v. Smithwick, 721 S.W.2d 949 (Tex. App.—Eastland 1986, writ ref'd n.r.e.).....10

City of Dallas v. Stewart, 361 S.W.3d 562 (Tex. 2012).....11

Combs v. City of Webster, 311 S.W.3d 85 (Tex. App.—Austin 2009, pet. denied).....11

Edaleen Dairy, LLC v. Johanns, 467 F.3d 778 (D.C. Cir. 2006).....5

Edwards Aquifer Auth. v. Chem. Lime, Ltd., 291 S.W.3d 392 (Tex. 2009).....10

Evans v. U.S., 74 Fed. Cl. 554 (2006), aff'd, 250 Fed. Appx. 321 (Fed. Cir. 2007).....6

Gen. Servs. Comm'n v. Little-Tex Insulation Co.,
39 S.W.3d 591 (Tex. 2001) 9

Hearts Bluff Game Ranch, Inc. v. State,
381 S.W.3d 468 (Tex. 2012) 10

Houston Mun. Emps. Pension Sys. v. Ferrell,
248 S.W.3d 151 (Tex. 2007) 9

Koretoff v. Vilsack,
614 F.3d 532 (D.C. Cir. 2010) 6

R.R. Comm'n of Tex. v. WBD Oil & Gas Co.,
104 S.W.3d 69 (Tex. 2003) 10

Reata Const. Corp. v. City of Dallas,
197 S.W.3d 371 (Tex. 2006) 11

Reg'l Rail Reorganization Act Cases,
419 U.S. 102 (1974) 12

Tarrant Reg'l Water Dist. v. Gragg,
151 S.W.3d 546 (Tex. 2004) 10

Tex. Comm'n on Envtl. Quality v. Kelsoe,
286 S.W.3d 91 (Tex. App.—Austin 2009, pet.
denied) 11

*Town of Flower Mound v. Stafford Estates Ltd.
P'ship*, 135 S.W.3d 620 (Tex. 2004) 10

Statutes and Regulations

7 C.F.R. § 900.51(i) 4

7 C.F.R. § 906 1

7 C.F.R. § 959 1

7 C.F.R. § 981.52 1

7 C.F.R. § 989.15 4

7 C.F.R. § 993.57 1

7 U.S.C. § 608c(1) 4

7 U.S.C. § 608c(14)(A) 3

7 U.S.C. § 608c(15) 10

7 U.S.C. § 608c(15)(A) 3, 7

76 Fed. Reg. 24921 (April 29, 2011) 1

TEX. GOV'T CODE § 2001.001 8

TEX. GOV'T CODE § 2001.003(1) 9

TEX. GOV'T CODE § 2001.038 10

TEX. GOV'T CODE § 2001.171 9

TEX. GOV'T CODE § 2007.024(c)-(d) 12

TEX. INS. CODE § 31.001 8

TEX. WATER CODE § 5.001 8

Other Authorities

1 BEAL, TEXAS ADMINISTRATIVE PRACTICE AND PROCEDURE § 9.3.1[c].....11

2 RONALD L. BEAL, TEXAS ADMINISTRATIVE PRACTICE & PROCEDURE, §11.2.1 (2009) 9

S. REP. NO. 1011, 74th Cong. 1st Sess., 14 (1935).....7

TCEQ, *Track Pending Enforcement Actions*, http://www.tceq.texas.gov/compliance/enforcement/penenfac/index.html 8-9

Tex. State Library & Archives Comm'n, *TRAIL List of Texas State Agencies*, https://www.tsl.state.tx.us/apps/lrs/agencies/index.html.....8

Texas Department of Insurance, TDI Enforcement Actions, at http://www.tdi.texas.gov/commish/actions.html 9

INTEREST OF AMICUS CURIAE

Marketing orders issued under the Agricultural Marketing Agreement Act of 1937 (AMAA) govern the production of fruits and vegetables grown on a large scale in the State of Texas. See 7 C.F.R. § 906 (oranges and grapefruit grown in lower Rio Grande valley); 7 C.F.R. § 959 (South Texas onions). Texas ranks among the top producers of other crops that have been the subject of proposed marketing agreements under the AMAA.[1] Any agricultural product within the scope of the AMAA is potentially subject to appropriation through a marketing order similar to the Raisin Marketing Order at issue in this case. Though that order's reserve requirement does not feature in all AMAA marketing orders, it is not unique to raisins. See, e.g., 7 C.F.R. § 981.52 (almonds); 7 C.F.R. § 993.57 (prunes). Because Texas citizens currently operate under AMAA marketing orders, and because additional marketing orders may issue in the future, the State of Texas has a substantial interest in the questions presented.

---

[1] See Proposed National Marketing Agreement Regulating Leafy Green Vegetables, 76 Fed. Reg. 24292, 24307 (April 29, 2011) (including Texas in list of "anchor States that produce the majority of leafy green vegetables in the United States").

SUMMARY OF ARGUMENT

The AMAA requires raisin "handlers," but not raisin "producers," to raise all challenges to the Raisin Marketing Order through the statute's administrative review procedures. Respondent argued successfully to the Ninth Circuit that petitioners qualify as handlers under the AMAA. Yet respondent maintains—and the Ninth Circuit held—that petitioners are not entitled to raise their takings claim as a defense to an administrative enforcement action because they bring that claim in their capacity as producers, not in their capacity as handlers. The Ninth Circuit's holding finds no support in the text of the AMAA, and it undermines the statute's purpose of channeling any handler's challenge to a marketing order through the statutory review process. Respondent's reading of the AMAA serves only to maximize the government's flexibility to avoid challenges to marketing orders. Whatever its short-term advantages in this litigation, this interpretation of the statute ultimately disserves the government's interest in finality, handlers' interest in expeditious resolution of challenges to marketing orders, and Congress' intent to maintain an efficient regulatory system.

Like the United States, the State of Texas maintains a comprehensive regulatory scheme that covers a broad spectrum of industries and individuals. Also like the federal government, Texas frequently confronts claims by regulated entities seeking just compensation when state administrative

agencies take private property for public use. The Texas regulatory scheme demonstrates that takings claims, whether raised affirmatively or defensively, do not require complex bifurcated procedures, as takings claims in Texas are resolved in a single proceeding with other challenges to administrative action. Resolving all claims in a single proceeding serves the interests of the government and of regulated entities by promoting efficient and final resolution of administrative claims.

ARGUMENT

I. THE AMAA REQUIRES PETITIONERS TO PURSUE ALL CHALLENGES TO MARKETING ORDERS THROUGH THE ADMINISTRATIVE REVIEW PROCESS.

The issue of statutory interpretation presented in question two provides an adequate nonconstitutional basis to reverse the Ninth Circuit. The logic of the petitioners' argument is straightforward and irrefutable. The AMAA grants "[a]ny handler" the unqualified right to challenge marketing orders under the terms of the Act. See 7 U.S.C. §§ 608c(14)(A), (15)(A). The Raisin Marketing Order defines "handler" to mean:

> (a) Any processor or packer; (b) any person who places, ships, or continues natural condition raisins in the current of commerce from within the area to any point outside thereof; (c) any person who delivers off-grade raisins, other failing raisins or raisin residual

> material to other than a packer or other than into any eligible non-normal outlet; or (d) any person who blends raisins . . . .

7 C.F.R. § 989.15; cf. 7 U.S.C. § 608c(1) (stating that "processors, associations of producers, and others engaged in the handling of any agricultural commodity or product thereof" are referred to as "handlers" under the Act); 7 C.F.R. § 900.51(i) ("The term handler means any person who, by the terms of a marketing order, is subject thereto, or to whom a marketing order is sought to be made applicable . . . ."). At the urging of respondent, the court below determined petitioners to be handlers. JA 301. It follows from that determination that petitioners are required to challenge marketing orders through the administrative procedures provided for handlers under the AMAA.

The Ninth Circuit's effort to avoid the statutory text by borrowing the concept of "producer-handlers" from milk marketing orders mistakes the significance of petitioners' dual status as raisin producers and raisin handlers. Assuming that producer-handler status has any significance outside the context of milk marketing orders, it does not support the decision below. Cases involving milk producer-handlers instruct that the availability of administrative remedies under the AMAA depends on the capacity in which the producer-handler sues. Under this test, the Ninth Circuit's decision must be reversed.

Respondent maintains (and the Ninth Circuit held) that petitioners do not raise their takings claim as handlers because "the committee's acquisition of raisins . . . affects [petitioners] only in their capacity as producers." Br. in Opp. to Cert. at 17; see also JA 305. This conclusion does not square with the cases on point, which establish that the capacity in which a party sues under the AMAA is the capacity in which it is burdened (or benefited) by the statute. See, e.g., *Edaleen Dairy, LLC v. Johanns*, 467 F.3d 778, 783 (D.C. Cir. 2006) ("If a producer-handler asserts an injury in its capacity as a handler, then it is bound by the administrative exhaustion requirements of the AMAA"); cf. *Ark. Dairy Coop. Assoc. v. U.S. Dep't of Agriculture*, 573 F.3d 815, 826 (D.C. Cir. 2009) (holding that milk producers may seek judicial review of milk marketing orders under the APA); id. at 823 n.4 ("Where a single entity acts as a vertically-integrated 'producer-handler,' it must exhaust before bringing suit in its capacity as a handler, but not when bringing suit in its capacity as a producer."). The Raisin Marketing Order imposes duties on petitioners only in their capacity as handlers. When they raise a defense to those duties, they necessarily do so in the same capacity.

The suggestion that handlers who produce raisins must be treated as producers finds no support in law or fact. Respondent asserts that raisin handlers "have no ownership interest that might be affected by the committee's acquisition of producers' raisins." Br. in Opp. to Cert. at 16. But this is

plainly not the case when a handler produces its own raisins, as petitioners do. Even if handlers lacked an ownership interest in an independent producer's raisins, a handler unquestionably has an ownership interest in raisins that it produces, and that interest is directly affected by the requirement that it set aside a portion of its raisins for the committee. Indeed, when the Court of Federal Claims considered a takings claim presented by raisin producers, it explained that "if plaintiffs themselves packaged their raisins or introduced them into interstate commerce, they would be deemed handlers . . . and would then have an administrative remedy." *Evans v. U.S.*, 74 Fed. Cl. 554, 564 (2006) (citations omitted), aff'd, 250 Fed. Appx. 321 (Fed. Cir. 2007); cf. *Koretoff v. Vilsack*, 614 F.3d 532, 540 (D.C. Cir. 2010) (holding that regulatory classification of almond "producer-retailers" as handlers required them to exhaust administrative remedies under the AMAA).

To insist that "no inconsistency arises from treating [petitioners] as handlers when they act as handlers and producers when they act as . . . producers," Br. in Opp. to Cert. at 18, misapprehends the effect of the decision below and of respondent's own interpretation of the AMAA. The statute does not, as respondent maintains, merely "subject [petitioners] to the particular benefits and burdens of the role they have assumed." Id. Quite the opposite; respondent would subject petitioners to the burdens imposed on handlers by the AMAA but deny them

the benefit of administrative procedures Congress created expressly for handlers.

Erecting an extra procedural hurdle for handlers who also happen to be producers conflicts not only with the text of the statute, but also with "Congress' intent to establish an 'equitable and expeditious procedure for testing the validity of orders, without hampering the Government's power to enforce compliance with their terms.'" *Block v. Community Nutrition Institute*, 467 U.S. 340, 348 (1984) (quoting S. REP. NO. 1011, 74th Cong. 1st Sess., 14 (1935)). Forcing petitioners and similarly situated handlers to pursue takings claims under the Tucker Act seems especially likely to undermine the government's enforcement interest, as a separate post-deprivation remedy would leave a cloud of uncertainty over orders issued in AMAA enforcement proceedings.

The only apparent purpose served by respondent's interpretation of the Act is to perpetuate a heads-I-win-tails-you-lose procedural matrix that preserves the government's ability to frustrate challenges to marketing orders.[2] Whatever short-term tactical advantage this may provide

---

[2] To take just one example, the district court's opinion describes how the USDA successfully moved to dismiss an administrative petition filed by the petitioners under 7 U.S.C. § 608c(15)(A) on the ground that "since Plaintiffs did not admit that they were handlers during the time period in question, they had no jurisdiction to file an administrative petition as handlers." JA 131.

cannot justify the cost to handlers and to the integrity of the statutory enforcement scheme.

II. THE TEXAS ADMINISTRATIVE SCHEME DEMONSTRATES THAT PIECEMEAL LITIGATION OF TAKINGS CLAIMS IS UNNECESSARY.

The Texas regulatory system demonstrates that takings claims need not bring an additional layer of procedural complexity to administrative proceedings. Texas has over 150 state agencies regulating state activity on topics ranging from environmental quality to insurance. See Tex. State Library & Archives Comm'n, *TRAIL List of Texas State Agencies*, https://www.tsl.state.tx.us/apps/lrs/agencies/index.html; TEX. WATER CODE § 5.001 *et seq.* (Texas Commission on Environmental Quality); TEX. INS. CODE § 31.001 *et seq.* (Texas Department of Insurance). Accordingly, Texas has developed a thorough state administrative structure, which includes procedures for administrative and judicial review of state agency action. See Texas Administrative Procedure Act, TEX. GOV'T CODE § 2001.001, *et seq.*

Texas administrative proceedings and associated proceedings in the state court system may be initiated by state agencies or regulated entities. Agencies can, for example, institute enforcement actions to ensure regulatory compliance. E.g., TCEQ, *Track Pending Enforcement Actions*, http://www.tceq.texas.gov/compliance/enforce-

ment/penenfac/index.html; Texas Department of Insurance, TDI Enforcement Actions, at http://www.tdi.texas.gov/commish/actions.html. Typically, a contested-case proceeding before an administrative law judge follows, and "the legal rights, duties, or privileges of a party are . . . determined . . . after an opportunity for adjudicative hearing." TEX. GOV'T CODE § 2001.003(1). A party aggrieved by agency action then has "a right to judicial review of a contested case order for all agencies of statewide jurisdiction or other agencies specifically required to comply" with the Texas Administrative Procedure Act. 2 RONALD L. BEAL, TEXAS ADMINISTRATIVE PRACTICE & PROCEDURE, §11.2.1, at 11-10 (2009); see also TEX. GOV'T CODE § 2001.171. Moreover, the appropriate state court has jurisdiction to review agency orders alleged to violate a constitutional right or adversely affect a vested property right. *Houston Mun. Emps. Pension Sys. v. Ferrell*, 248 S.W.3d 151, 157 (Tex. 2007); *Gen. Servs. Comm'n v. Little-Tex Insulation Co.*, 39 S.W.3d 591, 599 (Tex. 2001).

Regulated entities may also challenge the validity or applicability of agency rules in a declaratory judgment suit:

> The validity or applicability of a rule . . . may be determined in an action for declaratory judgment if it is alleged that the rule or its threatened application interferes with or impairs, or threatens to interfere

> with or impair, a legal right or privilege of the plaintiff.

TEX. GOV'T CODE § 2001.038; see also *Edwards Aquifer Auth. v. Chem. Lime, Ltd.*, 291 S.W.3d 392, 399 (Tex. 2009) (declaratory challenge to validity of agency rule); *R.R. Comm'n of Tex. v. WBD Oil & Gas Co.*, 104 S.W.3d 69, 74-76 (Tex. 2003) (discussing review of rules and contested-case rulings); cf. 7 U.S.C. § 608c(15) (authorizing pre-enforcement petition for declaration that marketing order "is not in accordance with law" and providing jurisdiction for appeal in the appropriate federal district court). And a party aggrieved by regulatory action can also file suit alleging an unconstitutional taking. See *Hearts Bluff Game Ranch, Inc. v. State*, 381 S.W.3d 468, 477-78 (Tex. 2012); *Town of Flower Mound v. Stafford Estates Ltd. P'ship*, 135 S.W.3d 620, 646 (Tex. 2004); *Tarrant Reg'l Water Dist. v. Gragg*, 151 S.W.3d 546 (Tex. 2004); *City of Abeline v. Smithwick*, 721 S.W.2d 949, 951 (Tex. App.—Eastland 1986, writ ref'd n.r.e.).

But once judicial review of regulatory action commences, all claims and defenses regarding that action should typically be raised in that proceeding, including constitutional takings claims or defenses. Thus, unlike the Ninth Circuit's unwieldy bifurcated scheme—where a takings claim cannot be heard in defense to an enforcement action—arguments that an administrative determination amounts to an unconstitutional taking generally should be made on appeal to the courts from the administrative review,

not in a subsequent stand-alone lawsuit for a refund. See, e.g., *City of Dallas v. Stewart*, 361 S.W.3d 562, 568 (Tex. 2012) (authorizing *de novo* judicial review of takings claim in response to board's decision that building was a nuisance and ordering its destruction); *Combs v. City of Webster*, 311 S.W.3d 85, 92 (Tex. App.—Austin 2009, pet. denied) (providing judicial review of claim that comptroller determination about tax code and recovery of tax revenue amounted to unconstitutional taking); see also *Reata Const. Corp. v. City of Dallas*, 197 S.W.3d 371, 377 (Tex. 2006) (holding claims defensive to governmental entity's claim for monetary recovery properly brought and not subject to immunity). Indeed, in Texas, even though a constitutional takings "'claim may be asserted for the first time in the district court upon appeal of the agency order, a failure to comply with the appeal deadlines and/or the failure to so assert the constitutional claim at that time, precludes a party from raising the issue in a separate proceeding.'" *Stewart*, 361 S.W.3d at 580 (quoting 1 BEAL, TEXAS ADMINISTRATIVE PRACTICE AND PROCEDURE § 9.3.1[c]); see also *Tex. Comm'n on Envtl. Quality v. Kelsoe*, 286 S.W.3d 91, 97 (Tex. App.—Austin 2009, pet. denied).

Adjudicating takings defenses in a single proceeding makes sense for all concerned. The State has no interest in discovering long after the fact that agency action caused a taking that now requires unanticipated retrospective compensation. Far better to know, as soon as possible, all costs for the

State associated with contemplated agency action. The same is true for the party subject to a taking, who is best served by a prompt decision, whether it results in compensation, invalidation of the underlying regulatory action, or conclusive denial of the claim.

The remedial scheme for successful takings claims involving real property in Texas reflects the sensible preference for knowing all costs associated with regulatory action as soon as possible, and certainly before the action is non-reversible. Under the Texas real-property remedial scheme, the State has the option, after a judicial finding that there is a taking of real property, either to invalidate the agency action or pay just compensation. *See* TEX. GOV'T CODE § 2007.024(c)-(d). Understandably, this option is viable only so long as there is an opportunity to reverse course on the agency action; hence, needless delay in resolving takings claims undermines the remedial scheme. Moreover, *requiring* "delay until any [subsequent] adjudication" of the question whether there has been a taking—as the Ninth Circuit would require—"would be exceedingly irresponsible" because it could eliminate any opportunity "to consider whether to abandon the whole [government action] if it turned out that the entire value of the . . . [action] must be paid in cash." *Reg'l Rail Reorganization Act Cases*, 419 U.S. 102, 150 n.36 (1974).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

GREG ABBOTT
Attorney General of Texas

DANIEL T. HODGE
First Assistant
Attorney General

JONATHAN F. MITCHELL
Solicitor General

ANDREW S. OLDHAM
Deputy Solicitor General
Counsel of Record

RICHARD B. FARRER
MATTHEW H. FREDERICK
DOUGLAS D. GEYSER
Assistant Solicitors General

OFFICE OF THE
ATTORNEY GENERAL
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
andy.oldham@
texasattorneygeneral.gov
(512) 936-1700

COUNSEL FOR AMICUS CURIAE

January 2013